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IN THE

Supreme Court of The United States

October Term, A. D., 1964

WILLIAM DANDY,
Petitioner,

vs.

STATE OF WEST VIRGINIA,
WILLIAM J. THOMPSON, Judge of the Intermediate Court of Kanawha County, West Virginia, and
CHARLES M. WALKER, Prosecuting Attorney of Kanawha County, West Virginia,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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IN THE

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WILLIAM DANDY,
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VS.

STATE OF WEST VIRGINIA,
WILLIAM J. THOMPSON, Judge of the Intermediate Court of Kanawha County, West Virginia, and
CHARLES M. WALKER, Prosecuting Attorney of Kanawha County, West Virginia,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioner, William Dandy, prays that a writ of certiorari be issued to the Supreme Court of Appeals of West Virginia, to review the judgment of that Court entered in the case styled "State of West Virginia, ex rel William Dandy vs. William Thompson, Judge of the Intermediate Court of Kanawha County, and Charles Walker, Prosecuting Attorney of Kanawha County, West Virginia, Respondents."

JURISDICTION

The petitioner was indicted at the June 1963 term of the Intermediate Court of Kanawha County, West Virginia, for a felony, charging petitioner with the larceny of cigarettes and with having received stolen cigarettes. The petitioner was put to trial upon said indictment on the 5th day of August, 1963.

On the 5th day of trial, after the defense was well into the presentation of its case, the trial court determined it had erred in the introduction of certain cigarettes on behalf of the State and did then, over the objection of petitioner, declare a mistrial.

The trial court and respondents herein reset the petitioner's trial in October, 1963, and petitioner filed pleas of double jeopardy and autrofois acquit, which were stricken by the trial court and petitioner was ordered to trial. The Supreme Court of Appeals of West Virginia refused on petition for Writ of Prohibition to prohibit the retrial of petitioner and therefore refused to accord petitioner his constitutional rights under the Fifth and Fourteenth Amendments of the United States Constitution and under Article III, Section 5 of the Constitution of West Virginia.

Jurisdiction of this Court is invoked under the Fifth and Fourteenth Amendments of the United States Constitution and under Article 3, Section 5 of the West Virginia constitution and in accordance with Rule 19 (a) of the revised rules of the Supreme Court of the United States and Title 28, Section 1257 (3) USCA.

The Supreme Court of Appeals of West Virginia has decided a federal question of substance in a way not in accord with the applicable decisions of the United States Supreme Court, to-wit, that an accused may be put to trial a second time for the same offense when, over accused's objection, a jury is discharged in the first trial by an attempted declaration of a mistrial and when no "manifest necessity" existed for the declaration of said mistrial or discharge of the jury.

The Supreme Court of Appeals of West Virginia has decided a federal question of substance that has not yet been decided by the Supreme Court of the United States, to-wit, does the West Virginia Code of 1931 as amended, Chapter 62, Article III, Section 7, which permits a defendant to be retried for the same offense, when a jury is discharged over his objection, violate the Constitution of the United States in general and in particular the Fifth and Fourteenth Amendments thereof, and the Constitution of the State of West Virginia in general, and in particular, Article III, Section 5, thereof.

JUDGMENT BELOW

The judgment to which petitioner seeks a writ of certiorari was entered by the Supreme Court of Appeals of West Virginia on the 25th day of February, 1964, finding that petitioner was not entitled to the writ of prohibition prayed for in his said petition, (Appendix XII) and which order permits respondents to retry petitioner in violation of the Fifth and Fourteenth Amendments of the United States Constitution and of Article III, Section 5 of the West Virginia Constitution.

QUESTIONS PRESENTED

I. Has petitioner once been in jeopardy for the offense which respondents propose to retry him, so that to retry petitioner would violate his constitutional rights guaranteed him by the Fifth and Fourteenth Amendments of the United States Constitution, and by Article III, Section 5 of the West Virginia Constitution.

II If petitioner has been in jeopardy, has the jeopardy been set at naught sufficiently to permit him to be retried and not violate his constitutional guarantees set forth above.

III. Does Chapter 62, Article III, Section 7 of the Code of West Virginia of 1931, as amended, violate and contravene the Fifth and Fourteenth Amendments of the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

IV. Is the failure of the trial court to direct a verdict of acquittal in a case where the trial judge admitted on the record that, if he struck from the evidence certain illegally seized evidence which he then determined was inadmissible then there was nothing to go to the jury, so tantamount to an acquittal that to permit petitioner to be retried upon the same indictment would violate the Fifth and Fourteenth Amendments to the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, provides in part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .nor be deprived of life, liberty or property without due process of law."

United States Constitution, Amendment 14 provides in part:

> " . . .no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

West Virginia Constitution, Article III, Section 5, provides in part:

> ". . . nor shall any person in any criminal case. . . be twice put in jeopardy of life or liberty for the same offense."

STATEMENT OF THE CASE

Petitioner, William Dandy, was indicted jointly with another person at the June 1963 Term of the Intermediate Court of Kanawha County, West Virginia, a court of competent jurisdiction, on the 17th day of June, 1963, for a felony alleging in the first count a larceny of certain cigarettes and in the second count, illegally receiving stolen cigarettes (full indictment set out in Appendix I), which indictment was held by that Court to be sufficient in form and substance.

Petitioner was granted a separate trial from his co-defendant, and his trial began on the 5th day of August, 1963. The first count was dropped and petitioner went to trial on the second count, upon a plea of not guilty. A jury was empaneled and duly sworn to try the case.

The State through its first witness, offered into evidence certain cigarettes obtained by said witness from the petitioner.

A preliminary inquiry of fact was granted by the Court, and, much evidence was heard by the Court in chambers regarding their admissibility and held that they were admissible. Upon resumption of the trial in front of the jury said cigarettes were, over the objection of the petitioner, introduced into evidence. Whereupon at that time the petitioner moved for a mistrial, which the Court refused.

After the State had rested its case the petitioner, after having his motion for directed verdict overruled, proceeded to call various witnesses in his defense.

During the trial, petitioner had made a number of motions fo mistrial, based upon errors of law allegedly committed by the trial judge, all of which had been refused by the trial judge. Late in the afternoon of the 4th day of trial, and after petitioner had called several witnesses for his defense, the Court retried to Chambers and the question of the propriety of admitting the cigarettes into evidence was again raised by the Court and the Court adjourned until the following morning, August 9, 1963, to permit the Prosecuting Attorney to look further into the law in this regard.

On the 5th day of trial, August 9, 1963, apparently the Prosecuting Attorney reached the conclusion that petitioner was correct, and apparently agreed that said cigarettes were illegally seized and should not have been introduced into evidence. Thereupon, petitioner moved to strike all the evidence and all testimony regarding said cigarettes and to remove the cigarettes as exhibits. Whereupon, the Court stated, "What you have made here is a motion to strike, but the question is whether I can cure the thing after I have let all this evidence about the cigarettes in." (R. p. 910) Whereupon petitioner requested the Court for a ruling on his motion to strike, and then advised the Court he would move for a directed verdict of acquittal. Whereupon, the Court later said, "I wouldn't grant you a directed verdict, but I will give you a mistrial. **Whether they can try it again I don't know.* (R. p. 911). Counsel for petitioner then replied, "I don't think I want a mistrial at this stage, we have gone so far into this matter, I don't think a mistrial at this point would be proper, your Honor." (R. p. 911) Whereupon counsel for petitioner again requested a ruling on his motion to strike and the Court said, "How can I get all this testimony out about the cigarettes, and leave anything for the jury? That is most of the testimony." (R. p. 912). Then the following took place:
Record page 912:

> "MR. PREISER: I would respectfully request your Honor instruct the jury. . .this would be my thought at this time. . .that your Honor instruct the jury that all the evidence regarding the seizure of the cigarettes, all the evidence of

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*Emphasis supplied

any cigarettes in the posession of Dandy, is stricken, that they should not consider the facts of any cigarettes; that the cigarettes themselves should be removed from the presence of the jury, that the jury be instructed they shall disregard any testimony concerning the fact that William Dandy was supposed to have had the cigarettes in his possession, or took them to the Arcade basement.

"THE COURT: How is it humanly possible for the jury to separate that?

"MR. PREISER: I don't know that it would be, all I can say, *the defendant would be prejudiced to give him a mistrial.* (Emphasis supplied)

Record page 913:

"THE COURT: You have made enough motions for a mistrial. All I have to do is go back, change my ruling on one of them.

"MR. PREISER: The case has turned materially for the defendant, evidence may not be available to the defendant that is available here, at another trial. And I think, I am not sure this is the law, but I think unless the defendant consents to a mistrial, I don't think it can be granted.

"THE COURT: *All I would have to do is go back and change one of my rulings.* (Emphasis supplied)

"MR. PREISER: We would like then to proceed, I don't think we want a mistrial, we would prefer to have the Court instruct the jury . . . to remove the cigarettes from the consideration of the jury, and strike any testimony concerning the fact the cigarettes were supposed to have been in the possession of the defendant.

Record, page 914:

"THE COURT: I don't think it would go that far.

"Suppose I take a little recess now, and you'll all come back in a little while."

It is admitted by all concerned that petitioner had never been absent at least to this point of the trial.

After the aforementioned adjournment the following occurred in the Court's chambers. Upon reconvening we here set out verbatim all that occurred from this point until everyone left the courthouse. It is somewhere during these last two or three minutes that the State claims the petitioner was in the court room and not in the Judge's chambers.

"THE COURT: I am going to declare a mistrial; then if you have something you want to look into, we can consider it at a later date.

"MR. PREISER: First, without waiving any of my motions I made during the trial, I withdraw all of my prior motions for a mistrial, *as I stated earlier.* I would like to call your Honor's attention to three cases, if I may. (Emphasis supplied)

"THE COURT: The question is here whether you may waive such a serious matter as this. If you went on, and the State got a conviction, and then you get out of the case, and somebody else gets to be his attorney and he goes up and it is on the constitutional rights, how can you waive it?

"MR. PREISER: I am saying we are entitled to a directed verdict.

"THE COURT: *I have changed my ruling, and will grant that motion you earlier made.* If you want to be heard on your motion for a directed verdict, I can hear you at a later date. *All you are interested in is the man's jeopardy; if you can establish jeopardy, you are satisfied.* (Emphasis supplied)

"MR. PREISER: I would like to get on the record before your Honor rules, *I withdraw my motions for a mistrial, I think that is highly prejudicial to the defendant, it would be coercing or an attempt to coerce a second trial.* (Emphasis supplied)

"I would like to refer your Honor to three cases, *Gruber vs. State*, 3 W. Va. 699.

Record, page 916:

("Then counsel for defendant quoted from said case.)

"THE COURT: You can still save that right at a later date.

"MR. PREISER: Then, under the ruling in *State* v. *Little*, we think to declare a mistrial violates the defendant's rights under the United States Constitution, and Amendments 4, 5, 6 and 14, thereunder, and it volates the rule under Mapp (?) vs. Ohio, and violates the West Virginia Constitution, and also violates the various articles of the United States Constitution.

"The third case, ex parte Flynn, 111 Federal 257 in this case the jury was out for a long time, the Court said the Judge has no right at any time to discharge the jury or declare a mistrial, without the consent of the defendant.

"We think we are entitled to a directed verdict of acquittal, we think if your Honor declines our right to an acquittal, we are entitled to a dis-

missal of the indictment, the discharge of the defendant; and if your Honor fails to do that, *we are entitled to at least our rights to a jury trial. We don't want a mistrial.* (Emphasis supplied)

Record 917:

"We think any attempt to go back and grant my motions for a mistrial made earlier, which I have withdrawn on the record, or even if I hadn't withdrawn them, any attempt on the part of the Court to grant a mistrial, I respectfully submit to the Court, would be circumventing the rights of this defendant to a speedy trial, and a violation of his rights under the Constitution of the United States and the Constitution of West Virginia; plus the fact the trial has taken a superior turn in advantage to the defendant, he has been in jeopardy.

"THE COURT: As I stated before, I will hear you on these points at a later date."

This is the point at which petitioner left the Court's chambers. (See the undenied testimony of petitioner to this effect record deposition p. 34 and p. 35)

"MR. WALKER: I might mention to your Honor, the defendant has not been present during this last session here in chambers, so we could not proceed with the trial any further anyway."

Only the preceding 12 paragraphs could have occurred out of petitioner's presence, they did not affect petitioner's rights, and were repetitious of what had already occurred.

"Thereupon, the Court, counsel for the respective parties, and the reporter, returned to the courtroom, where, in the presence of the defend-

ant and the jury, the following transpired: (Record, p. 917)

Record, 918:

"THE COURT: Ladies and gentlemen of the jury, *because of error which the Court has committed in permitting certain evidence to come into the trial, which the Court has concluded was not admissible, I am declaring a mistrial and discharging you from this case.* (Emphasis supplied)

"(The jury was then discharged.)

"MR. PREISER: If your Honor please, we want to again show our objection to the discharge of the jury, the granting of the mistrial, and again renew our motion that the jury be recalled and the Court direct a verdict for the defendant, and if that is overruled—

"THE COURT: I will hear you on all of those matters on the 27th of August.

"MR. PREISER: We most respectfully move again for a dismissal of the indictment.

"THE COURT: I will hear you then on that. I will continue it, then, to August 30th."

The mistrial was declared over petitioner's objection.

On the 20th day of September, 1963, petitioner did file his pleas with the trial court of autrofois acquit and his plea of double jeopardy, alleging that to retry him would violate the United States Constitution Fifth and Fourteenth Amendments and the West Virginia Constitution, Article III, Section 5, both of which were stricken over objection of the defendant, and the Court did advise that said case would be set for trial on a day certain September 23, 1963, a certified copy of the

Orders filing said pleas and a certified copy of said Pleas are attached hereto and marked for identification, petitioner's Appendix III, IV, V, and VI, respectively, and asked to be made a part hereof.

The Court on September 20, 1963, did enter an Order which is dated August 9, 1963, the defendant having objected to the entry, language, form and conclusions of the Order, a certified copy of said Order which makes the transcript of the proceedings held in Chambers on August 9, 1963, part of said Order, and said transcript being hereto attached and marked for identification petitioner's Appendix II, which Order purportedly sets forth the reasons for the mistrial, which reasons are not substantiated by the transcript filed and made a part of said Order. (And which order Petitioner says is void because dated August 9, and not actually entered until September 20th and was not entered nunc pro tunc.)

The respondent trial Judge ordered this petitioner to be retried upon the same count of the indictment and before the same court, on the 21st day of October, 1963.

Nothing was done out of the presence of petitioner affecting his rights. At no time was the petitioner's absence, which absence occurred after the Court stated he was going to declare a mistrial, mentioned as any ground of the mistrial, until argument on his motion for acquittal on September 3, 1963, some three weeks after the mistrial was granted.

The Order bearing date August 9, 1963, Petitioner's Appendix II, was not signed by the trial judge, or en-

tered or filed until September 20, 1963, as it clearly shown by the last paragraph of said Order, and by the testimony of Freda Barton, Clerk of the said Intermediate Court (Deposition Record, p. 90).

Petitioner is the same William Dandy who was indicted in the Intermediate Court of Kanawha County, West Virginia, on the 17th day of June, 1963, under the indictment marked petitioner's Appendix I, and that he is the same William Dandy who was put to trial upon said indictment in said court on August 5, 1963, and is the same William Dandy whose case ended in a mistrial granted over his objection on August 9, 1963, and is the same William Dandy who filed his plea of autrofois acquit in said Court, and is the same William Dandy that the respondents intend to re-try upon said indictment.

Petitioner says that he has been once put in jeopardy for that which respondents propose to re-try him, in violation of the Constitution of the State of West Virginia, Article III, Section 5, and in violation of the Constitution of the United States of America, the Fourteenth and Fifth Amendments thereto, and therefore the Intermediate Court of Kanawha County, West Virginia, is wholly without jurisdiction to act further in this cause, and that its further action, if any, would exceed its jurisdiction and authority, and this petition for writ of certiorari is based upon uncontroverted facts, and that said Court and the prosecuting attorney of Kanawha County, West Virginia, will continue to act without jurisdiction and exceed their authority unless they are prohibited from so doing by the lawful process of this Court.

That the Court's statement of record, "How can I get all this testimony out about the cigarettes, and leave anything for the jury? This is most of the testimony" clearly indicates that once the court held the evidence of the cigarettes was inadmissible there was nothing left for the jury to pass on and the court should have granted petitioner's motion for directed verdict of acquittal, and therefore, petitioner has been tried upon the indictment, and the action taken was tantamount to an acquittal, and therefore defendant has been once put in jeopardy for that which respondents propose to try him again.

That the testimony adduced before the Supreme Court of Appeals of West Virginia, by way of deposition, reveals that it was through no fault of your petitioner that he could not get into the judge's chambers, and further that nothing affecting his rights occurred out of his presence, but to the contrary after the trial judge made it clear he was granting a mistrial, petitioner's counsel put statements on the record in an effort to protect petitioner's rights.

Petitioner filed a petition for Writ of Prohibition in the Supreme Court of Appeals of West Virginia praying that these respondents be prohibited from retrying petitioner in violation of his constitutional rights both Federal and State.

RULING OF THE COURT BELOW

The Supreme Court of Appeals of the State of West Vrginia denied to your petitioner a writ of prohibition and discharged the rule to show cause why respondents should not be prohibited in retrying your petitioner and thereby did affirm and perpetuate the rulings and

errors of the Intermediate Court of Kanawha County, denying unto your petitioner his constitutional rights.

The Supreme Court of Appeals of West Virginia did hold that petitioner was correct in his contentions: (1) that he had been in jeopardy; (2) that jeopardy was not set at naught when the trial judge declared a mistrial because of his error in permitting the State to introduce the illegally seized cigarettes. However, they held finally that petitioner's alleged absence for some 2 to 3 minutes at the end of the case set jeopardy at naught and permits a retrial of this petitioner.

The last holding is the one complained of by petitioner as being clearly erroneous, and permits a Court to retry a defendant in violation of the constitutional safeguards against double jeopardy.

POINTS RAISED FOR ALLOWANCE OF WRIT

1. The United States Constitution and its amendments and the Constitution of West Virginia, prohibit an accused being tried twice for the same offense (United States Constitution, 5th and 14th Amendments, West Virginia Constitution. Article III, Section 5).

2. This petitioner has once been in jeopardy for the same offense for which respondents are attempting to again try him.

3. The respondent Trial Judge discharged the jury before trial was completed over objections of petitioner.

4. The Supreme Court of Appeals of West Virginia has held in the present case that jeopardy under which

petitioner was placed has been removed and held for naught under a statute of the State of West Virginia, Code of 1931, as amended, Chapter 62, Article III, Section 7, said statute purportedly granting the trial judge a right to discharge the jury in case of a "manifest necessity".

5. The petitioner alleges:

a. Petitioner has once been in jeopardy for the offense involved and to retry him would violate the Fifth and Fourteenth Amendments of the United States Constitution.

b. No "manifest necessity" existed in this case which would set jeopardy at naught.

c. The statute under which the trial court acted is void as violative of the United States Constitution and the West Virginia Constitution.

d. Respondents are estopped to retry petitioner by virtue of the United States Constitution.

e. That the trial court's action was tantamount to an acquittal and petitioner has therefore been once acquitted and to retry him would violate the constitutional provisions above referred to.

f. To retry petitioner for the offense which respondents are attempting to retry him will violate the Fifth and Fourteenth Amendments to the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

g. Respondents will exceed their jurisdiction and violate substantial federal constitutional rights of this petitioner unless prohibited by this court.

h. A substantial federal question arising under the Constitution of the United States was raised in the trial court, the Supreme Court of Appeals of West Virginia and is herein involved in this petition for Writ of Certorari.

i. The questions raised are of great public and general interest and importance.

6. It is of the greatest importance to an individual's rights and to the public that a State court not be allowed to retry a defendant under circumstances like this case. To do so would allow State courts to violate the Fifth and Fourteenth Amendments to the United States Constitution. It would permit an unscrupulous or unprincipled prosecutor or trial judge, anytime they did not like a particular jury or did not like how a particular trial was going to declare a mistrial over defendant's objections and retry him at their convenience. This they could do simply by the prosecutor making even a short statement to the Court, or the Court making a short statement to anyone out of the defendant's presence and then urge a mistrial purportedly to protect defendant's rights, and grant the same allegedly as a "manifest necessity", which really has the effect of violating a defendant's Federal rights.

It is sincerely believed that certorari should be granted in this case to prevent the violation of an accused's right not to be twice placed in jeopardy in violation of the United States Constitution.

ARGUMENT

I. The Fifth and Fourteenth Amendments to the United States Constitution and Article III, Section 5, of the West Virginia Constitution prohibit a defendant from being twice placed in jeopardy and from being denied due process of law.

II. The petitioner in this case has been once placed in jeopardy for the offense which respondents are now attempting to place him again on trial.

The West Virginia cases and other authorities clearly hold that jeopardy attaches upon the jury being empaneled and sworn, 2 M.J. 627:

> "The general rule, supported by the weight of authority and the best considered cases, is that when a person has been placed on trial, on a valid indictment, before a court of competent jurisdiction has been arraigned, has pleaded, and a jury has been empaneled and sworn, he is in jeopardy."

State v. *Little*, 120 W. Va. 213, 197 S.E. 627:

> "When an accused pleads not guilty to a valid indictment and a jury is sworn to try the isssue thereby raised, jeopardy begins, subject to Code 62-3-7, . . ."

III. Once jeopardy attaches, in West Virginia it can only be set at naught to permit a retrial, in accordance with West Virginia Code, Chapter 62, Article III, Section 7, when a "manifest necessity" within the meaning of said statute requires the trial judge to discharge the jury before reaching a verdict and then only if said

statute is constitutional and not violative of the United States and West Virginia Constitutions.

The West Virginia Code of 1931 as amended, Chapter 62, Article III, Section 7, provides in the second sentence as follows:

> "And in any criminal case the court may discharge the jury, when it appears they cannot agree in a verdict, or that there is manifest necessity for such discharge."

Here there is no claim that the jury could not agree on a verdict, because they were discharged before petitioner had completed his defense.

Therefore, it appears clear that unless the Court's action in discharging the jury falls within Code 62-3-7 as being a "manifest necessity" for discharging the jury, then jeopardy has not been set at naught.

The Court attempted to grant a mistrial by attempting to go back and grant one of petitioner's earlier motions for a mistrial. (R. p. 915)

Before the attempt to grant a mistrial, petitioner objected and withdrew all prior motions for mistrials, all of which has previously been overruled by the Court. (R. p. 914)

The reason the trial court gave counsel and the jury for wanting to grant a mistrial was that he did not believe he could cure the error he had made in permitting the State to introduce the illegally seized cigarettes. Petitioner, at that point in the trial, believing that the jury would acquit him, insisted on going to

the jury and urged the court to allow the trial to proceed. (R. p.p. 912, 913, 916)

Even after the Court discharged the jury, petitioner requested that the jury be recalled and again objected to their discharge. (R. p. 918)

The petitioner's only motion at the time in question was to strike the illegally seized cigarettes, which was improperly admitted as evidence on behalf of the State. It was the Court's own volition to act in the manner of granting a mistrial at that time.

A. An Error of Law Committed by Trial Court in Allowing Illegally Seized Evidence to Be Introduced by the State Does Not Constitute a "Manifest Necessity" to Discharge the Jury Over the Objection of Accused Within the Meaning of the Aforementioned Statute.

In *State v. Whitman*, 74 P2d 696, 93 Utah, 557, the Court discharged the jury over the accused's objection for one of two reasons, which the Court did not make clear, either for misconduct of accused's counsel or because the Court felt it had erred in a prior ruling. The Court held double jeopardy banned a retrial. We quote as follows:

> "It is not altogether, and at all times within the discretion of the court to stop the prosecution and still hold the accused to answer to the same offense on a future charge. It may discharge the jury under peculiar circumstances in cases of necessity, for circumstances of such nature that neither the court nor the attorney nor the parties have any control over them. But to warrant this course there should be some emergency over which neither court nor attorney has control.

> "We do not mean at present to define or designate any of the cases in which this practice may be pursued, but we all agree that a defendant ought in no case to be put on a second trial for the same offense where the jury has been discharged over defendant's objection, because the court did not like the conduct of counsel *or because the court may feel it has erred in prior rulings.*" (Emphasis supplied)

Also, see the opinion of the Supreme Court of Appeals of West Virginia, below (Appendix XI) wherein the Court followed the *Whitman* case (supra) and held:

> "There being no question of disagreement by the jury, the issue presented is: Does mere error on the part of the trial court create a manifest necessity for a mistrial? We are firmly of the opinion that it does not."

The Supreme Court of Appeals, below, further held that the trial court abused is discretion in discharging the jury and declaring a mistrial due to its error in allowing certain evidence to be introduced, and said "If this were the only basis for the Court's action, the petitioner would be entitled to the relief he herein seeks."

Therefore, it becomes clear that the error in introducing the cigarettes was insufficient to create a "manifest necessity" to discharge the jury and set jeopardy at naught.

However, the Supreme Court of West Virginia went on to hold that the non-presence of defendant was a "manifest necessity" for the declaration of the mistrial. The Court, however, failed to reconcile the para-

dox existent in its own opinion which holds on the one hand that mere error of the trial court is not a "manifest necessity" for the discharge of the jury over accused's objection, and on other that the commission of "reversible error" by the trial court in permitting a part of the proceedings to be conducted out of accused's presence is a "manifest necessity." It is submitted that the trial judge by the use of diligence could have determined whether or not the accused was present before commencing the in-chambers proceedings and if such determination had disclosed such non-presence it would have been a simple matter to bring the defendant forward.

The record shows that the trial judge did not know whether the petitioner was ever absent or not. (Record depositions Sherwood p. 81.

It seems incomprehensible that a "manifest necessity" to discharge the jury could exist in the trial judge's mind until he first made a judicial determination as to whether or not petitioner was absent for any period of time and, if so absent was anything done out of his presence affecting his rights or prejudicing him in any way. In this case no such determination was made so no "manifest necessity" could have existed.

The only place in the record where the trial court even indicates that defendant's absence created a "manifest necessity" requiring him to discharge the jury is in the order of September 20th, some 6 weeks after the trial was over. (This is the order dated August 9, but not drawn until September 20, as shown on the last page of the order which recites what occurred on September 20th.) To the entry of this order,

petitioner strenuously fought on the grounds that the order did not correctly state the facts nor correctly apply the law, yet the order was entered over petitioner's objections. (For order see Appendix II) (For transcript of hearings held before order was entered where petitioner tried to make order contain recitations of what actually occurred, see Record p 930 through 941.)

The Supreme Court of Appeals of West Virginia stated it was immaterial what reason the trial court stated on the record and in open court to the jury for his granting of the mistrial. With this we must disagree. There could be no "manifest necessity" if the court did not know whether petitioner was absent or if absent for how long, and what, if anything, affecting his rights occurred out of his presence. What happens to the requirement of public trials, etc., and of the defendant's rights to be advised of the Court's actions and rulings, if the Court has a right to tell the jury and the accused and the public one thing and then privately enter an order six weeks later setting forth entirely different things. We urge that therefore, petitioner's absence if any, was not in this case a "manifest necessity" to discharge the jury over petitioner's objections and permit him to be retried for the same offense.

The trial court's attempt to grant one of petitioner's earlier motions for a mistrial (none of which were based on petitioner's absence) is clearly improper and does not constitute a "manifest necessity" to discharge a jury nor does it act to abolish petitioner's objections to the discharge of the jury nor does it act to create petitioner's acquiesence to the jury's discharge. *State vs. Stiff*, 117 Kan 243, 118 Kan 208, 334 p. 700.

The Court's have held after the trial judge has once overruled defendant's motions for a mistrial there is not left a motion pending which he can later go back and grant. *State ex rel Williams vs. Grayson* (1956 Fla.) 90 So. 2d 710.

Also, sustaining above two points see *State ex rel Manning vs. Hines* 153 Fla. 711, 15 So. 2d 616 (1943).

Defendant has right to withdraw his motions for a mistrial, *Cardenas vs. Superior Ct.* 56 Cal. 2d 273. 14 Cal. Reporter 657, 363 P2d 889.

We are not unmindful of the few cases that hold the Court can go back and grant a defendant's earlier motion for a mistrial, but these cases are not in point because in those cases the Court pointed out either the defendant did not object or acquiesced.

There are some cases holding a trial may progress so far that the Court may lose its discretion. Some such cases are *People vs. Nickel*, 153 N.Y.S. 2d 954. Also see 22 C.J.S. 666, footnote 82.5 and 22 C.J.S. 669, and 22 C.J.S. 669 footnote 97.50 and U. S. v. Whitlow, D.C. 110 F. Supp. 871, Baker v. Commonwealth, 132 S.W. 2d 766, 768, 280 Ky. 165.

Even if defendant was absent during some part of the proceedings and even if something occurred affecting his rights, there still was not "manifest necessity" for discharge of the jury over his objection. This is true because all the cases dealing with the subject of "manifest necessity" make it extremely clear that there must exist some state of facts or circumstances over which neither the court, the attorneys or others have

control, and it must be extreme, an emergency, etc. It is submitted that it is within the control of the judge, the prosecutor and the court reporter to use such diligence as is necessary to insure that the defendant is at all times present. If such diligence is used, then in every instance, save a fugitive defendant, the defendant can easily be brought forward.

State v. *Little*, 120 W. Va. 213, 197 S.E. 626;

Gruber v. *State*, 3 W. Va. 699 (1869);

1 Criminal Trial in Virginia's, Sec. 89, p. 58 and Sec. 86, Former Jeopardy, p. 56;

22 C.J.S., Criminal Law, p. 672;

22 C.J.S., Criminal Law, p. 674;

Vol. 1, 12th Ed. Wharton's Criminal Law, Sec. 395;

People v. *Barrett*, 2 Caines (N.Y.) 304, 2 Am. Dec. 239.

B. Nothing in Fact Was Done Out of Petitioner's Presence Affecting His Rights Prior to the Granting of Any Mistrial.

The deposition of petitioner reveals that he was present beyond the point when the trial court stated, "I am going to declare a mistrial." Sometime later petitioner, believing his case was over went into the courtroom to so advise his wife. Two to three minutes later he was joined in the courtroom by counsel and the trial judge, whereupon the trial judge discharged the jury giving as his reason his error committed in letting into evidence, the illegally seized cigarettes. It is undisputed that petitioner could not because of the crowded condition of the judge's chambers, get him-

self completely inside. Petitioner's trial created tremendous publicity and public interest and when it became clear that the Court was granting a mistrial his chambers became filled with spectators, newspaper men, and others. Record depositions, p. 27, 44 and 46)

The following testimony of petitioner on this point is found at Record Deposition, p. 27:

"Q. But you stopped at the door?

"A. The room was full.

* * *

"A. * * * "The minute I got to the door the Judge says, I am going to declare a mistrial."

At page 44 of the same deposition:

"Q. When the Court reconvened after the recess on August 9th, you state that the chambers were quite crowded?

"A. Yes."

* * *

"Q. Were there enough seats in the Judge's chambers for all of the people when the court convened?

"A. No Sir."

At page 46:

"Q. Why did you leave the Judge's chambers at that time?

"A. I was going to tell my wife that there had been a mistrial."

Petitioner's testimony (record depositions as shown following) makes it factually clear nothing occurred

out of his presence affecting his rights. He says he was present when motions for directed verdict were made and when all motions for mistrial were withdrawn. The Record, page 915 and 916, shows this was done only a split second before the prosecutor's statement at (R. p. 917) that petitioner was not present. Also, it is undisputed it was only two to three minutes between the time petitioner walked into the courtroom until the Judge came out. (This was just long enough to put out the cigarettes, gather up the books and papers and walk out the door into the courtroom. Petioner's deposition, Record p. 21.)

> "A. Well the only thing I heard was Mr. Preiser object and he said that we didn't want a mistrial and he had already withdrew his motions for a mistrial and that we didn't want a mistrial."

Petitioner's deposition, R. 23:

Page 23

> "A. No, sir, I didn't stay there after he declared the mistrial."
>
> * * *
>
> "A. It was about two minutes or three minutes, everybody came out."

Petitioner's deposition, R. 34:

Page 34

> "A. The minute we walked in, the Judge said he was declaring a mistrial.
>
> "Q. Was that the first thing he said?
>
> "A. Yes, sir.

"Q. And nobody had asked him for anything; that declaring a mistrial was not in response to a statement by anybody else?

"A. No, sir. That is the first thing that was said when we walked in the room.

"Q. Did Mr. Preiser then commence a legal argument on that point?

"A. He said that we did not want a mistrial and we withdrew all of our motions to a mistrial."

Page 46

"Q. As far as you were concerned, was the trial over at that point?

"A. Yes."

Obviously, the trial was over before petitioner left the Court's chambers and certainly it has not been established that anything affecting his rights occurred out of his presence. By petitioner's testimony which is undenied, he was present until the Court said he would hear arguments at a later date. The only thing occurring out of petitioner's presence after that was the prosecutor's statement that petitioner was no longer present. If the trial was not over, then the trial judge could have brought petitioner back in chambers.

Deposition Record of petitioner's testimony shows petitioner heard the court say he would hear Mr. Preiser at a later time.

Bottom page 34:

"Q. What was the Court's response to that?

"A. He said anything they wanted to talk about, he would talk about it at a later date. He didn't even want to talk—the Judge didn't."

Petitioner's Deposition, Record p. 35:

"Q. Did you hear the Court say that he would hear Mr. Preiser at a later time?

"A. Yes, sir.

"Q. If I told you that the official record showed the Court said that and it was the last thing the Court said, that wouldn't change your recollection?

"A. He said at that time that if he wanted any talk about anything, he would talk later."

Record, page 917, shows that this was the last thing done before the Court reconvened in the courtroom and discharged the jury, at which time everyone admits and the record clearly shows, petitioner was present.

The testimony of Elliott Sherwood, the court reporter, reveals that although he prefaced the commencement of the record of the in-chambers session with a caption showing defendant's non-presence, he in fact was not aware of defendant's non-presence until it was called to the attention of the court by the prosecutor. This was the very last thing that occurred before the actualy discharge of the jury. Who knows whether or not petitioner stepped out one-tenth of a second before the prosecutor's statement?

Deposition Mr. Sherwood, p. 75, 76:

"Q. You really had not noticed that he was not present until Mr. Walker had called it to your attention, had you?

"A. I had not.

"Q. So the first time you knew he wasn't present was when Mr. Walker called it to your attention?

"A. True."

The petitioner in fact was not absent during any stage of the trial when his rights were affected.

The Record, page 911, clearly shows that the trial judge had made it abundantly clear that the trial was over, before petitioner left the judge's chambers, and if anything occurred during the two or three minutes between the time petitioner left the judge's chambers and when the judge told the jury there was a mistrial it was only petitioner's counsel's *repetition* of what had already been said so the Court reporter would put it in the record.

This is shown by counsel's statement "as I stated earlier," Record page 914, and by the Court's statement while defendant was in chambers "I am going to declare a mistrial; then if you have something you want to look into, we can consider it at a later date"—R. 914, and by petitioner's testimony, Deposition p. 27, that the judge had said he was going to declare a mistrial. Therefore, the trial was over before defendant left the court's chambers.

The defendant's testimony on deposition revealed he was present up to and including the point where the court stated he would hear further matters at a later date. The record reveals this was the very last thing the trial judge said before reconvening in open court, and only the prosecutor's statement as to petitioner's absence occurred between that statement of the court and his reappearance in open court. Therefore, from the cold face of the record, there is nothing to dispute the fact that the only part of the proceedings missed by petitioner was the prosecutor's statement that he was not present. This statement did not affect petitioner's

rights. The Court could have there and then brought the petitioner back into chambers if there was anything left to be done in the trial, but as is obvious from the record, for all practical purposes the trial was over before the petitioner left the court's chambers, even the petitioner had left in order to so advise his wife who was present in the courtroom. (Record Deposition, p. 46)

C. Every Absence of Accused Is Not Reversible Error and Will Not Constitute Error and Will Not Constitute a "Manifest Necessity" for a Mistrial.

The Supreme Court of Appeals of West Virginia in at least three cases have so held.

One such case was *State* v. *McHaffa*, 110 W. Va. 266, 157 S.E. 595 (1931) where discussion was had between the court and counsel in absence of accused regarding an instruction subsequently given. It was held not reversible error.

Another such case was *State* v. *Roberts*, 122 W. Va. 536, 11 S.E. 2d 172 (1940) wherein the clerk of the court, in the absence of defendant made a correction in a list of the panel of jurors, the court stating that the defendant was not prejudiced thereby.

Another such case is *State* v. *Lucas*, 193 W. Va. 743, 138 S.E. 393 (1927) which held that the calling of the names of the twelve jurors by the clerk after the challenges were completed and before the jury was sworn in the absence of the accused was not prejudicial error.

It would appear therefore that before the absence of an accused could be said to be a manifest necessity

for the discharge of a jury over the accused's objection, there would first have to be a determination by the trial court that something was done outside the presence of the accused which affected his rights.

In the instant case the defendant was undisputedly present up to and including the point where the trial judge stated, "I am going to declare a mistrial."

In the instant case ,the trial court stated "I am going to declare a mistrial." The trial court did in fact grant the mistrial stating to the jury why he did so. He would have done so and for that very reason whether or not the defendant was present. Consequently, nothing was done out of the presence of the petitioner affecting his rights. The matters and things placed upon the record immediately following the trial court's statement, "I am going to declare a mistrial" was merely a reiteration of matters stated to the trial court at the first in-chambers session that morning of August 9, 1963.

The fact that not until some three weeks later did the prosecution start urging the non-presence of defendant as having been a ground for the mistrial makes it abundantly clear, especially when viewed in light of what the Court told the jury as he discharged them that this was simply a device on the part of the State to attempt to get another opportunity to convict the defendant when they could not in this trial secure a conviction. It further makes it patently clear that the trial court as of August 9, 1963, had not made any determination that anything had been done out of defendant's presence affecting him.

It is respectfully submitted that the discussion had between counsel for defense and counsel for the State on the issue of this trial is no different than the discussion had on the proposing of an instruction and the objecting statement made thereto in the *McHaffa* case, supra.

D. The Trial Court is Bound by His Original Ruling and He Cannot by an Order Entered Approximately Six Weeks Later Put in Additional Grounds for the Mistrial on Discharge of the Jury in Order to Attempt to Set Jeopardy at Naught.

In *People v. Gehlberd* (1947) 70 NYS 2d 819, 272, App. Div. 914, at the end of the *People's* case, defendant moved to dismiss on ground that *People* had not made out a prima facie case. The Court stated "Motion is granted. The defendant is acquitted." Thereafter the court made an order to the effect that a motion of defendant to dismiss be granted on the grounds that the facts stated in the information do not constitute a crime. The *People* appeal both from the order and the acquittal.

At page 820.

> "The appeals are dismissed, defendant was charged, tried and acquitted and he cannot be retried. . .The order is a nullity."

Syl. 2 "In prosecution for unlawful practice of denistry, where court, at close of *People's* case granted defendant's motion to dismiss for insufficiency of the evidence, subsequent order dismissing the information for insufficiency was a nullity."

This establishes we believe, that in this case the State and Respondents cannot rely on petitioner's absence (if any) as sufficient to set jeopardy at naught.

E. It Appears to Be Clear Without the Citation of Authority that if the Jury Was Discharged Over Petitioner's Objections and No Mistrial Was Ever Declared Then Jeopardy Has Not Been Set at Naught.

Was a mistrial declared and if so, when?

1. If it was declared when the Court told counsel he was going to declare a mistrial, petitioner was still present and therefore nothing affecting his rights occurred out of his presence.

2. If it was declared when the Court told the jury he was declaring a mistrial for his error of law in admitting the cigarettes into evidence, then there was no "manifest necessity" for the mistrial because the trial judge at that time had made no judicial determination that anything had been done out of petitioner's presence. Even though the Court reporter's notes shows petitioner was absent during the last few minutes in the Court's chambers, the Court reporter on depositions, admits he did not know whether petitioner was present or absent, and that the Court did not know whether petitioner was present or absent.

There could be no "manifest necessity" for the Court to declare a mistrial based on petitioner's absence, if the Court did not know petitioner was absent, if absent at all, and there is nothing in the record showing a finding by the court that petitioner was absent or that if he was absent anything was done affecting his rights.

In 23A CJS, Criminal Law, Sec. 1385, p. 1033, it is said:

"A request for discharge of the jury and mistrial should be timely; and in discharging the jury the court cannot act arbitrarily, but must base its action on proper evidence.

"A request for discharge of the jury and mistrial should be timely, and it may be waived by failure to insist on it."

No one moved for a mistrial based on petitioner's absence, so in accordance with the above quote there was no evidence taken upon which court could act, and even if State had a right to ask for a mistrial, they waived the same by failing to make such a request.

3. If no mistrial occurs until an order is entered so stating, then no mistrial has yet been declared in this case, because the order entered attempting to so declare a mistrial is void.

The order itself dated August 9th and shown as entered August 9th was not actually entered until September 20th. This is shown by the last page of the order itself reciting what occurred on September 20th and also by the clerk's testimony (page 90 of deposition):

"Q. When you said it was entered around that time, do you mean it was around September 20, 1963?

"A. I believe so."

Also, this order was not entered nunc pro tunc. Clerk's testimony at page 92:

"A. No, it was not entered nun pro tunc."

In West Virginia an order entered and dated one day but entered later and not entered nunc pro tunc is void.

Chaney vs. State Compensation Commissioner, 127 W. Va. 521, 33 SE2d 284;

Payne vs. Riggs, 80 W. Va. 57, 92 SE 133;

Cameron vs. Cameron, 105 W. Va. 621, 143 SE 384;

Standard Supply Company vs. Delmar Coal Company, 110 W. Va. 560, 158 SE 907;

Teasley vs. Commonwealth (Virginia) 49 SE2d 604, Syl. 4 and 5;

Bloyd vs. Scroggins, 123 W. Va. 241, 15 SE2d 600.

In 23A C.J.S., Criminal Law, Section 1385, page 1034, it is said.

> "The order declaring a mistrial should be in writing; and the order discharging the jury should be entered formally on the record, and should set out the reasons for the order and all the essential facts on which it is based."

Therefore, if the order is void and a mistrial does not occur until the order is entered in writing no mistrial has yet been declared, and the jury was discharged over petitioners objection and jeopardy could not be set aside in accordance with the West Virginia statue regarding mistrials based on "manifest necessity" when no mistrial has been declared.

IV. The State of West Virginia, the respondent Trial Judge and the respondent Prosecuting Attorney are estopped to deny that petitioner has been in jeo-

pardy, and are estopped from claiming jeepardy has been set at naught, and estopped from claiming the absence of petitioner, momentarily, permits a retrial, and estopped from holding that West Virginia Code, Chapter 62, Article III, Section 7, permits petitioner to be retried for the same offense, and this is necessarily so in order to prevent an accused from being deprived of his rights under said United States Constitutional amendments and the West Virginia Constitution.

Even if a manifest necessity would exist for declaring a mistrial if a defendant is absent, or even if the law of West Virginia provides that a defendant is entitled to a new trial if he is absent at any stage of the trial still this is a constitutional right granted to an accused to be present at every stage of the trial, and this right can be waived just like the right granted by the 5th amendment not to testify can be waived.

We find no case where the court has said the State can rely on a defendants absence as grounds to set jeopardy aside as we have here. All the cases are based on the right as urged by the defendant. To now say that a defendants absence creates a manifest necessity and sets jeopardy aside, over his objection, is tantamount to taking a shield granted a defendant for protection and using it as a sword with which to strike him down.

The State and the respondents in this case are estopped to deny that jeopardy has attached and has not been set aside.

Analyzing the facts, we have a case where the court and prosecutor had made it clear to the petitioner the

case was over and he went out to tell his wife. We must now upon such facts as these not permit them to try him again. If we permit such as this to set jeopardy at naught we are opening the gate to an unscrupulous court or prosecutor to retry a defendant any time they do not like a jury or any time they do not like the way a trial is going.

For example, if the law in a case such as this would permit a defendant to be retried because of his alleged absence, look what an unscrupulous court or prosecutor could do: Anytime they did not like the jury or the way the trial was going the prosecutor out of the presence of the defendant could hurriedly say something to the trial judge and then insist on a mistrial because something occurred out of the defendants presence affecting his rights.

This we cannot allow - we must protect defendants against any such possibility and say the law guaranteeing a defendants right to be present at every stage of the trial is a "right for his protection" and not a right that a prosecutor may use to get a different trial when he wants one. This Court has already so agreed for in essence in *Green v. U. S.* (1952), 78 S. Ct. 221, 355 U. S. 184, where the Court of Appeals rejected defendants plea of former jeopardy and the case came on to this Court, this Court held that defendant could not be tried again for first degree murder, and at page 224, said:

> "Moreover it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge.

This Court as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. Wade v. Hunter, 336 U. S. 684, 69 S. Ct. 834, 93 L. Ed. 974, Kepner v. U. S., 195 U. S. 100, 128, 24 S. Ct. 797, 804, 49 L. Ed. 114. . . . *This prevents a judge or prosecutor from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict.*" (Emphasis supplied).

V. Chapter 62, Article III, Section 7 of the Code of West Virginia of 1931 as amended is unconstitutional as violative of the 5th amendment and 14th amendment of the United States Constitution and of Article III, Section 5 of the West Virginia Constitution.

This statue provides in effect that even though jeopardy has attached to an accused in a criminal trial, that if a "manifest necessity" exists the trial judge can discharge the jury before the trial is concluded or before a verdict is reached, over the objections of an accused, and that this will remove jeopardy and permit the accused to be tried again for the same offense.

It is respectfully submitted that this statue is unconstitutional and not enforceable as being violative of the United States and State Constitutional provisions above referred to, which prohibit double jeopardy.

To hold that this statue is enforceable would be in effect to say that the legislature of the State of West Virginia could, by passing a statue, amend the State and United States Constitution by placing an exception to the constitutional guarantees against double

jeopardy, and could do so without regard to the procedures set up to accomplish valid amendments. This power we do not believe our legislature has or should have.

The constitutional provisions involved contain no such exceptions as one contained in the statue referred to. If such exceptions are desirable the Constitution should be amended by the vote of the people and not by legislatures or courts.

When an accused has undergone 4 to 5 days of trial and insists on his rights to have that jury decide his case and he is deprived of that right by the trial judge, this is certainly one of the situations against which the constitution and its amendments were designed to protect, and no act of the legislature which permits an accused under such circumstances to be retried can be upheld.

If the general rule of construction is followed that a statute should be construed, if possible, as constitutional, then the inevitable conclusion must be that such statute does not permit an accused under the circumstances of this petitioner to be retried, therefore the statute can be held constitutional only if it is construed so as not to permit this petitioner to be retried. To construe this statute in such a way as to permit this petitioner to be retried under this state of facts is tantamount to construing it in such a way as to strike down the constitutional guaranty against double jeopardy.

VI. Failure to grant petitioner's motion for directed verdict was tantamount to an acquittal and to permit petitioner to be retried for same charge would violate the Fifth and Fourteenth amendments of the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

In *Bishop's New Criminal Procedure*, Volume 1, 4th Edition, (1895), Chapter LVII, Section 820, page 481, the following statement is made:

> "After the jeopardy of the law has attached, with no sufficient evidence against the prisoner, he is entitled to a verdict of acquittal, he should demand it. And the Court has no right to discharge the jury and hold him to answer before another."

In *Bishop's New Commentaries on the Common Law, Volume 1, 8th Edition*, (1892) Chapter LXIII Section 1037, "whenever, after the jury is sworn the evidence is found non-sufficient to convict; . . . no second trial can be had."

In the instant case, once it was determined that the cigarettes had been illegally seized and were not admissible into evidence, it became apparent that there was not sufficient evidence upon which the State could obtain a conviction. It then became incumbent upon the trial judge to direct a verdict of acquittal. This, he refused to do, but persisted in accordance with the urging of the Prosecuting Attorney in declaring a mistrial over the objection of the accused. The Court's statement made at the first in-chambers session on the morning of August 9, 1963, as follows:

> "THE COURT: How can I get all of this testimony out about the cigarettes and leave

> anything for the jury? That is most of the testimony." (Record, p. 912)

is indicative of the fact that a directed verdict of acquittal should be granted petitioner.

In accordance with the law as stated above where the directed verdict should have been granted, the defendant has been in jeopardy, and should not again be placed on trial.

VII. The questions raised are of great public and general interest and importance.

The writers of our Constitutions, the Federal Constitution through the Fifth and Fourteenth Amendments and the West Virginia Constitution by Article III, Section 5, recognize the necessity of protecting the individual from the powers wielded by the State. Concepts of justice then as now looked askance upon any procedure which would require one to be twice burdened for the same offense. Our forefathers said this cannot be, we as a free nation still say this cannot be.

The rule insisted on by petitioner is merely a furtherance of what has, since our nation began been true, i.e., no individual must bear the brunt of what could happen if an unscrupulous court or prosecutor out of perhape vindicativeness or a desire to secure that "all important conviction" should at some point in a trial, going bad for the State, hurriedly make some comment to the court regarding the case when the accused's back is turned. Can such prosecutor or court then use that to gain perhaps another and better chance to secure that conviction? If the opinion of the Supreme Court of Appeals of West Virginia becomes the law of the

land than the flood gates are open to place an accused totally at the mercy of such possible unscrupulous court or prosecutor. In addition a first will have occurred—i.e., for the first time in the conduct of an American criminal trial the State will have been permitted to use a defendant's shield as a sword against him.

The public is genuinely interested in the questions here presented and there is great general interest and importance in the questions here involved. It is urgently suggested to this Honorable Court that this case must be reviewed so that all persons charged with crime, their attorneys, Public Prosecutors and Trial Judges may be advised when a jury may be discharged over an accused's objections so as to, or not to, bar such accused's retrial under his United States constitutional guarantees, against double jeopardy, due process, and equal protection of the laws.

CONCLUSION

We respectfully submit that petitioner has been in jeopardy and jeopardy has not been set at naught. To retry petitioner would violate his constitutional guaranty against double jeopardy and deprive him of due process and equal protection of the laws, and unless prohibited by this Honorable Court, the State of West Virginia, William J. Thompson, Judge, and Charles M. Walker, Prosecuting Attorney, will retry this petitioner exceeding their jurisdiction to do so and in violation of this petitioner's constitutional rights and in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

Respectfully submitted,

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W. DALE GREENE
PREISER, WEAVER & DAUGHERTY,
Counsel for Petitioner.

APPENDIX I

INDICTMENT

State of West Virginia, Kanawha County, ss:

IN THE INTERMEDIATE COURT OF SAID COUNTY:

The Grand Jurors of the State of West Virginia, in and for the body of the County of Kanawha, and now attending the said Court, upon their oaths present, that WILLIAM DANDY and NORMAN E. BROWN, alias "Natie" Brown, within one year next prior to the date of the finding of this Indictment, in said County of Kanawha, three thousand five hundred thirteen packages of cigarettes of assorted brands, all of the value of $1,053.90 of the goods and chattels of Champion Pyramid Vendors, Inc., a corporation, then and there being found, then and there unlawfully and feloniously did steal, take, and carry away, against the peace and dignity of the State.

SECOND COUNT: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said WILLIAM DANDY and NORMAN E. BROWN, alias "Natie" Brown within one year next, prior to the date of the finding of this Indictment, in the said County of Kanawha, did unlawfully and feloniously buy and receive from some evilly disposed persons to the Grand Jurors unknown and aid in concealing and transfer to a person other than Champion Pyramid Vendors, Inc., a corporation, the owner thereof, three thousand five hundred thirteen packages of cigarettes of assorted brands, all of the value of $1,053.90, which said property had been unlawfully and feloniously stolen, taken, and carried away from the said owner by some evilly disposed persons to the Grand Jurors unknown the said WILLIAM DANDY and NORMAN E. BROWN, alias "Natie" Brown well knowing and having reason to believe that said goods and chattels had been unlawfully and feloniously stolen, taken, and carried away, against the peace and dignity of the State.

Found at the June Term of said Court, 1963, upon the information of Capt. George Nunley, CPD, Charleston, W. Va., Det. Robert Crouse, CPD, Charleston, W. Va., sworn in open Court and sent before the Grand Jury to give evidence to that body.

CHARLES M. WALKER
Prosecuting Attorney.

APPENDIX II

ORDER DATED AUGUST 9, 1963, BUT ENTERED SEPTEMBER 20, 1963, AND TRANSCRIPT OF PROCEEDINGS HAD ON AUGUST 9, 1963.

(STATE OF WEST VIRGINIA,

At an Intermediate Court for Kanawha County held at the Court House thereof on the 9th day of August, 1963.)

STATE OF WEST VIRGINIA

vs

WILLIAM DANDY

William Dandy, who stands indicted for a felony, this 9th day of August, 1963, appeared in Court to answer his recognizance heretofore entered into, and the jury heretofore empaneled and sworn again appeared in Court pursuant to their adjournment of yesterday, having heard the State's evidence in full and the defendant's evidence in part. The State's evidence included 225 cartons of cigarettes seized without a search warrant in the presence of the defendant and the defendant not having been placed under arrest. Immediately prior to and after the admission of said cigarettes into evidence, the defendant made motions to withdraw a juror and declare a mistrial of the case. All such motions having been overruled the trial proceeded. The State having thereafter rested and the defendant having begun to present evidence, the Court, based on the evidence of the defendant, determined that said ciragettes marked State's Exhibit Number One had been improperly admitted into evidence.

The Court determined that it would be practically impossible to cure the error of having permitted said cigarettes to be introduced as evidence on behalf of the State and that defendant's motion for mistrial should have been granted and it appearing in the certified record that the defendant, William Dandy, was not present at the in-chamber hearing during which the trial was in progress, the Court by reason of the previous motions of the defendant for a mistrial, which the Court is now of the opinion should have been granted, and for the further reason that the trial of this case had proceeded out of the presence and hearing of the defendant William Dandy, and that the rights of the said William Dandy to be present at all stages of his trial could not be

waived, and in fact were not waived, and that as a result thereof a continuation of the trial would have been futile, by reasons of the fact that in the event of conviction the appellate Court would have been required to grant an appeal and reverse the conviction, and to grant a new trial, the Court therefore was of opinion to and did thereby order a mistrial of the said cause, in order to prevent a manifest injustice to the defendant.

It is further ordered by the Court that a transcript of the proceedings, properly certified by the Official Reporter of the Court and by the Court, with respect to the proceedings had in the chambers of the Court both in and out of the presence of the defendant, be filed herewith and made a part of this order.

The defendant having objected to the aforesaid ruling of the Court this case was continued until the 3rd day of September, 1963, at which time the defendant presented argument and brief in support of his motion that a verdict of Not Guilty be entered or in the alternative that the defendant be discharged from further prosecution or in the alternative that the State be prohibited from any further prosecution of the defendant for the reason that the defendant had been in jeopardy and the Court having maturely considered argument of counsel upon said motion does overrule the same, to which rulings of the Court the defendant objects and excepts and to which order, its language and form, the defendant objects and excepts.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, LEWIS A. HATCHER, Clerk of the Intermediate Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 23rd day of September, 1963.

LEWIS A. HATCHER, Clerk
Intermediate Court, Kanawha
County, West Virginia

* * *

PROCEEDINGS had in the case of State of West Virginia vs. William Dandy, in the Intermediate Court of Kanawha County, West Virginia, on Friday, the 9th day of August, 1963, during the June, 1963 Term of said Court, being the fifth day of trial of said case.

BEFORE: Honorable William J. Thompson, Judge, and a Jury.

APPEARANCES

For the State: Charles M. Walker, Esq., Prosecuting Attorney, and A. T. Ciccarello, Esq., Assistant Prosecuting Attorney for Kanawha County.

For the Defendant: Stanley E. Preiser, Esq., and Dale Greene, Esq.

* * *

The trial of this case was resumed on Friday, the 9th day of August, 1963, at 9:30 o'clock a.m., pursuant to the adjournment previously made.

PRESENT: As before noted.

* * *

Thereupon, the Court, counsel for the respective parties, the defendant, and the reporter, again retired to chambers, out of the hearing of the jury, where the following transpired:

THE COURT: What do you have on that point now?

MR. WALKER: If it is all right with the Court, I will let Tom give the Court what we found, and I may add something.

MR. CICCARELLO: We have made a fairly comprehensive research of this problem, and we found this: That sometime ago, that is, before 1961, etc., etc.

(The proceedings continued off the record.)

MR. PREISER: Based on that, may I make a motion, your Honor?

THE COURT: Yes.

MR. PREISER: We move now to strike the evidence and all testimony regarding the cigarettes, to remove the cigarettes as exhibits, there has been no evidence of waiver, the evidence put

on by the State quite clearly shows they never relied on a waiver. Earlier their reliance was Mr. Dandy had no standing. But the testimony, Nunley's, Bias', clearly shows, and I don't think the State had taken the position there was a waiver, at least, they haven't down to this time.

Now, I think the defendant does have a standing, and we move to strike all the evidence regarding the cigarettes, and all testimony thereto.

THE COURT: The only difficulty, the thing that bothers the Court, if I would hold that there wasn't a waiver, and in light of Nunley's testimony, which will be to the effect that he did make that statement, I don't see how you would say that the officer, talking about getting a search warrant, the way the officer did, Nunley did, in the presence of the defendant, and then going to the Arcade following that, I don't see how that would be freely and voluntarily given.

I can't see that the officer has any right to talk about a search warrant, and not go get it.

MR. PREISER: That is my point, the basis of the motion.

THE COURT: What you have made here is a motion to strike, but the question is whether I can cure the thing after I have let all of this evidence about the cigarettes in.

MR. PREISER: I don't think you can. We would like a ruling, if your Honor please, on our motion to strike. Then I would move the defendant be discharged, and a directed verdict of acquittal be entered for the defendant. It should have been entered at the end of the State's case.

THE COURT: Do you think if I strike the evidence and you go ahead, would that correct it?

MR. PREISER: I think all the testimony regarding the cigarettes should be stricken, along with the evidence itself. If that is done, there is no case made against the defendant. Therefore, I respectfully say to the Court the Court would be obligated to direct a verdict for the defendant at the end of the State's case, if they have no cigarettes in evidence, and no testimony concerning them. If the cigarettes go out, the testimony about them goes out, also.

We move for a direct verdict of acquittal for the defendant.

THE COURT: I wouldn't grant you a directed verdict, but I will give you a mistrial. Whether they can try it again, I don't know.

MR. PREISER: I don't think I want a mistrial at this stage, we have gone so far into this matter, I don't think a mistrial at this point would be proper, your Honor.

MR. CICCARELLO: A mistrial is proper at any time before the verdict.

MR. PREISER: I am not certain this is the law, I think there are some cases I have read at one time on that.

THE COURT: I would overrule your motion for a directed verdict.

MR. PREISER: How does your Honor rule on striking the cigarettes, and any testimony pertaining thereto.

THE COURT: How can I get all this testimony out about the cigarettes, and leave anything for the jury? That is most of the testimony.

MR. PREISER: I would respectfully request your Honor instruct the jury—this would be my thought at this time—that your Honor instruct the jury that all the evidence regarding the seizure of the cigarettes, all the evidence of any cigarettes in the possession of Dandy, is stricken, that they should not consider the facts of any cigarettes; that the cigarettes themselves should be removed from the presence of the jury, that the jury be instructed they shall disregard any testimony concerning the fact that William Dandy was supposed to have had the cigarettes in his possession, or took them to the Arcade basement.

THE COURT: How is it humanly possible for the jury to separate that?

MR. PREISER: I don't know that it would be. all I can say, the defendant would be prejudiced to give him a mistrial.

THE COURT: You have made enough motions for a mistrial. All I have to do is go back, change my ruling on one of them.

MR. PREISER: The case has turned materially for the de-

fendant, evidence may not be available to the defendant that is available here, at another trial. And I think, I am not sure this is the law, but I think unless the defendant consents to a mistrial, I don't think it can be granted.

THE COURT: All I would have to do is go back and change one of my rulings.

MR. PREISER: I would object to it, I think once the evidence of the cigarettes is not admitted, there is nothing to carry this case to the jury on.

THE COURT: I would have to go into that; I think there is.

MR. PREISER: We would like them to proceed, I don't think we want a mistrial, we would prefer to have the Court instruct the jury—to remove the cigarettes from the consideration of the jury, and strike any testimony concerning the fact the cigarettes were supposed to have been in the possession of the defendant.

THE COURT: I don't think it would go that far.

Suppose I take a little recess now, and you all come back in a little while.

Thereupon, the trial of this case stood in recess.

* * *

(After recess.)

Thereupon the Court, counsel for the respective parties, and the reporter, retired to chambers, out of the hearing of the jury, with the defendant not present, where the following transpired:

THE COURT: I am going to declare a mistrial; then if you have something you want to look into, we can consider it at a later date.

MR. PREISER: First, without waiving any of my motions I made during the trial, I withdraw all of my prior motions for a mistrial, as I stated earlier. I would like to call your Honor's attention to three cases if I may.

THE COURT: The question is here whether you may waive such a serious matter as this. If you went on, and the State got a conviction, and then you get out of the case, and somebody else gets to be his attorney and he goes up and it is on the constitutional rights, how can you waive it?

MR. PREISER: I am saying we are entitled to a directed verdict.

THE COURT: I have changed my ruling, and will grant that motion you earlier made. If you want to be heard on your motion for a directed verdict, I can hear you at a later date. All you are interested in is the man's jeopardy; if you can establish jeopardy, you are satisfied.

MR. PREISER: I would like to get on the record before your Honor rules, I withdraw my motions for a mistrial, I think that is highly prejudicial to the defendant, it would be coercing or an attempt to coerce a second trial.

I would like to refer your Honor to three cases, Gruber vs. State, 3 W. Va. 699.

(Then counsel for defendant quoted from said case.)

THE COURT: You can still save that right at a later date.

MR. PREISER: Then, under the ruling in State vs. Little, we think to declare a mistrial violates the defendant's rights under the United States Constitution, and Amendments 4, 5, 6 and 14 thereunder, and it violates the rule under Mapp (?) vs. Ohio, and violates the West Virginia Constitution, and also violates the various articles of the United States Constitution.

The third case, ex parte Flynn, 111 Federal, 257, in this case the jury was out for a long time, the Court said the Judge has no right at any time to discharge the jury or declare a mistrial, without the consent of the defendant.

We think we are entitled to a directed verdict of acquittal, we think if your Honor declines our right to an acquittal, we are entitled to a dismissal of the indictment, the discharge of the defendant; and if your Honor fails to do that, we are entitled to at least our rights to a jury trial. We don't want a mistrial.

We think any attempt to go back and grant my motions for a mistrial made earlier, which I have withdrawn on the record, or even if I hadn't withdrawn them, any attempt on the part of the Court to grant a mistrial, I respectfully submit to the Court, would be circumventing the rights of this defendant to a speedy trial, and a violation of his rights under the Constitution of the

United States and the Constitution of West Virginia; plus the fact the trial has taken a superior turn in advantage to the defendant, he has been in jeopardy.

THE COURT: As I stated before, I will hear you on those points at a later date.

MR. WALKER: I might mention to your Honor, the defendant has not been present during this last session here in chambers, so we could not proceed with the trial any further anyway.

* * *

Thereupon, the Court, counsel for the respective parties, and the reporter, returned to the courtroom, where, in the presence of the defendant and the jury, the following transpired:

THE COURT: Ladies and gentlemen of the jury, because of error which the Court has committed in permitting certain evidence to come into the trial, which the Court has concluded was not admissible, I am declaring a mistrial and discharging you from the case.

(The jury was then discharged.)

MR. PREISER: If your Honor please, we want to again show our objection to the discharge of the jury, the granting of the mistrial, and again renew our motion that the jury be recalled and the Court direct a verdict for the defendant, and if that is overruled—

THE COURT: I will hear you on all of those matters on the 27th of August.

MR. PRIESER: We most respectfully move again for a dismissal of the indictment.

THE COURT: I will hear you then on that. I will continue it, then, to August 30th.

* * *

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

I, Elliott B. Sherwood, Official Reporter of the Intermediate Court of said County, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in chambers,

in the trial of the case of State of West Virginia vs. William Dandy, for a felony, as stated in the caption hereof, had at the June 1963 Term of said Court, as reported by me in shorthand and transcribed into the English language.

Given under my hand this 19th day of September, 1963.

ELLIOTT B. SHERWOOD
Official Reporter.

APPENDIX III

ORDER FILING MOTION AND PLEA IN BAR

(STATE OF WEST VIRGINIA,

At an Intermediate Court for Kanawha County held at the Court House thereof on the 20th day of September, 1964.)

State of West Virginia
v.
William Dandy

This day came the defendant, William Dandy, by his Attorney, and presented to the Court his written Motion and Plea in Bar praying that in the alternative,

1. That a judgment of not guilty be entered in his favor; or
2. That he be discharged from further prosecution in this case; or
3. That the State be prohibited from further prosecution of this case against the defendant for the reason he has once been in jeopardy; and asked leave to file said written Motion and Plea in Bar, which is granted and said written Motion and Plea in Bar is hereby ORDERED filed.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA SS:

I, LEWIS A. HATCHER, Clerk of the Intermediate Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 7th day of May, 1964.

LEWIS A. HATCHER, Clerk,
Intermediate Court, Kanawha
County, West Virginia.

APPENDIX IV

MOTION AND PLEA IN BAR

IN THE INTERMEDIATE COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v.

WILLIAM DANDY

MOTION AND PLEA IN BAR

TO THE HONORABLE WILLIAM J. THOMPSON, JUDGE OF SAID COURT:

Comes now the defendant, William Dandy, and represents unto the Court that at the June 1963 term of the Intermediate Court of Kanawha County, West Virginia, after having previously entered a plea of not guilty, a jury was empaneled and duly sworn to try this case, that after the State had rested its case and after the defense was well along in his case, the Court did grant a mistrial over the objection of the defendant, basing the mistrial upon the Court's error in permitting the State to introduce certain cigarettes into evidence allegedly seized from the defendant or from the Arcade Tobacco Store, Inc., which evidence was introduced over the objection of the defendant, that before and after said mistrial was ordered by the Court over the objection of the defendant, the defendant did upon the record move the Court for a directed verdict of not guilty, that a judgment of not guilty be entered in favor of the defendant, and that the defendant be discharged from further prosecution, all of which the Court said it would take up at a later date.

Defendant now says that he has been placed in jeopardy upon the charge for which he was indicted in this cause in this Court, and that the granting of the mistrial over the objection of this defendant is equivalent to an acquittal, and therefore the defendant respectfully moves the Court in the alternative as follows:

1. That a verdict of not guilty be entered in favor of the defendant;

2. That the defendant be discharged from further prosecution of this cause;

3. The State be prohibited from further prosecuting this defendant upon the matters or things alleged in the indictment against him for the reason he has once been in jeopardy and any further trial would violate his constitutional guarantee by placing him in jeopardy twice for the same alleged offense.

/s/ WILLIAM DANDY

Stanley E. Preiser
Preiser, Weaver & Daugherty
Third Floor Union Building
Charleston, West Virginia
Attorney for Defendant.

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

WILLIAM DANDY, defendant in the hereto annexed Motion and Plea in Bar, being by me first duly sworn according to law, upon his oath says that the facts and allegations therein contained are true, except insofar as they are therein stated to be upon information, and insofar as they are therein stated to be upon information, he believes them to be true.

/s/ WILLIAM DANDY

Taken, subscribed and sworn to before me this 9th day of September, 1963.

My commission expires September 17, 1969.

/s/ GLOE L. McCURDY,
Notary Public.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, LEWIS A. HATCHER, Clerk of the Intermediate Court for said County and in said State, do hereby certify that the foregoing is a true copy as filed in my said office as of the 20th day of September, 1963.

Given under my hand and the seal of said Court this 7th day of October, 1963.

LEWIS A. HATCHER, Clerk
Intermediate Court, Kanawha
County, West Virginia.

APPENDIX V

ORDER FILING PLEA OF AUTREFOIS ACQUIT

(STATE OF WEST VIRGINIA,

At an Intermediate Court for Kanawha County held at the Court House thereof on the 20th day of September, 1963.)

State of West Virginia
vs.
William Dandy

This day came the defendant William Dandy and presented to the Court his written Plea of Autrofois Acquit and asked leave to file the same, which leave is granted, and said written motion is hereby ORDERED filed.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, LEWIS A. HATCHER, Clerk of the Intermediate Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 7th day of May, 1964.

LEWIS A. HATCHER, Clerk,
Intermediate Court, Kanawha
County, West Virginia.

APPENDIX VI

PLEA OF AUTREFOIS ACQUIT

IN THE INTERMEDIATE COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

vs.

WILLIAM DANDY

PLEA OF AUTROFOIS ACQUIT

TO THE HONORABLE WILLIAM J. THOMPSON, JUDGE OF SAID COURT:

And the said William Dandy in his own proper person comes into Court here and having heard the said indictment read says that the State ought not further to prosecute the said indictment against him, the said William Dandy, because he says that heretofore, to-wit, at the Intermediate Court of Kanawha County, West Virginia, June Term 1963 thereof, this defendant did enter a plea of not guilty and thereafter a jury was empaneled and duly sworn to try this case, that after the State had rested its case and after the defense was well along in his case the Court did grant a mistrial over the objection of the defendant, basing the mistrial upon the Court's error in permitting the State to introduce certain cigarettes into evidence allegedly seized from the defendant or from the Arcade Tobacco Store, Inc., which evidence was introduced over the objection of the defendant, that after said mistrial was ordered by the Court over the objection of the defendant, the defendant did upon the record move the Court for a directed verdict of not guilty, that a judgment of not guilty be entered in favor of the defendant, and that the defendant be discharged from further prosecution, all of which the Court said it would take up at a later date.

That pursuant to a rule of the Court, on the 3rd day of September, 1963, the Court did hear argument that counsel for the defendant and the Prosecuting Attorney of Kanawha County, West Virginia, upon the defendant's motions aforesaid, and the Court after hearing said arguments overruled said motions and set the case for trial at the September 1963 Term of said Court,

as by the record thereof more fully and at large apppears; which said ruling remains in full force and effect. And the said William Dandy avers that he, the said William Dandy, and the said William Dandy so indicted and tried as last aforesaid are one and the same person and no other and different person; and that the felony of which the said William Dandy was so indicted and tried as aforesaid and the felony of which the State intends to try the said William Dandy at the September 1963 Term are one and the same and not different felonies, and this the said William Dandy is ready to verify.

Wherefore he prays judgment that he may be discharged and dismissed by the Court here from the premises in the present indictment specified.

WILLIAM DANDY,
By Counsel.

Stanley E. Preiser
Preiser, Weaver & Daugherty
3rd Floor—Union Building
Charleston, West Virginia,
Attorney for Defendant.

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

WILLIAM DANDY, defendant in the hereto annexed Plea of Autrofois Acquit, being by me first duly sworn according to law, upon his oath, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be upon information, and insofar as they are therein stated to be upon information, he believes them to be true.

WILLIAM DANDY

Taken, subscribed and sworn to before me this 16 day of September, 1963.

My commission expires Sept. 17, 1969.

GLOE L. McCURDY
Notary Public

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, LEWIS A. HATCHER, Clerk of the Intermediate Court for said County and in said State, do hereby certify that the foregoing is a true copy as filed in my said office as of the 20th day of September, 1963.

Given under my hand and the seal of said Court this 7th day of October, 1963.

LEWIS A. HATCHER, Clerk
Intermediate Court, Kanawha
County, West Virginia.

APPENDIX VII

ORDER STRIKING PLEA OF AUTREFOIS ACQUIT AND PLEA IN BAR AND TRANSCRIPT OF OBJECTIONS TO ORDER DATED AUGUST 9, 1963

(State of West Virginia,

At an Intermediate Court for Kanawha County held at the Court House thereof on the 17th day of October, 1963.)

STATE OF WEST VIRGINIA
vs.
WILLIAM DANDY

On the 19th day of September, 1963, came the defendant in person and by counsel and came also the State of West Virginia by counsel. Thereupon the State did tender to the Court an order purporting to set forth the Court's reasons for declaring a mistrial in this case and further setting forth the Court's rulings on the motions made by defendant for a directed verdict of acquittal or in the alternative dismissal of the indictment and discharge the defendant or in the alternative prohibiting the State's attorneys from further prosecution of this case. Whereupon, the defendant tendered to the Court a proposed order setting forth the Court's ruling of September 3, 1963, on the aforesaid motions. To the order proposed by the State the defendant objected and excepted, and to the Order proposed by the defendant, the State objected and excepted, and no rulings thereon were made by the Court.

Whereupon, defendant tendered to the Court his written motion and plea in bar of further prosecution, and his Special Plea of Autrofois Acquit and asked leave to file same. Said motion and special plea in bar and plea of autrofois acquit were ordered filed.

Whereupon, an adjournment was ordered, with the Court to hear further discussion on the morning of September 20, 1963, at which time came the defendant in person and by counsel, came also the State of West Virginia by counsel; whereupon the State of West Virginia by counsel tendered to the Court and requested entry of a new proposed order, to the entry of which order, its language, conclusions and form, defendant objected and excepted.

Thereupon, the State by counsel did verbally move the Court to strike defendant's Plea of Autrofois Acquit and defendant's Motion and Plea in Bar of further prosecution, which said motion of the State was sustained, and said Plea of Autrofois Acquit and said Motion and Plea in Bar of further prosecution are hereby ORDERED stricken, to which action of the Court in striking said Plea of Autrofois Acquit and said Motion and Plea in Bar of further prosecution defendant Objected and Excepted.

It is further ORDERED that the transcript of the proceedings had in chambers on the morning of September 19, 1963 and September 20, 1963, be typed, be attached hereto and made a part of this order and filed hereby.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, LEWIS A. HATCHER, Clerk of the Intermediate Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 7th day of May, 1964.

LEWIS A. HATCHER, Clerk,
Intermediate Court, Kanawha
County, West Virginia.

IN THE INTERMEDIATE COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, Plaintiff,
v. On a Felony
WILLIAM DANDY, Defendant.

BEFORE: Honorable William J. Thompson, Judge.

APPEARANCES

For the State: Charles M. Walker, Esq., Prosecuting Attorney for Kanawha County, West Virginia.

For the Defendant: The Defendant, William Dandy, in person, and by Dale Greene, Esq., his attorney.

BE IT REMEMBERED THAT WHEN the above-styled case again came on for hearing, on the 19th day of September, 1963, being a Thursday, during the June, 1963 Term of said Court, pursuant to the adjournment heretofore ordered by the Court, the following proceedings were had, in Chambers:

THE COURT: Let the record show that the defendant tendered this order, and the State objected to the Court signing it; then the State tendered another order, and the defendant objected to the introduction of that order; and the Court entered the order tendered by the State.

MR. GREENE: Your Honor, for the record, we would like to be a little more specific to our objection to the State's order the Court indicated he will enter.

THE COURT: Yes.

MR. GREENE: May I go ahead?

THE COURT: Yes.

MR. GREENE: First of all, we object to the entry of the order itself, we object to the conclusions shown in the order. We don't believe that the order clearly and accurately reflects what happened. We think that if the order is going to show certain conclusions therein, with regard to one place I think it states after hearing certain new evidence, the Court again took under determination the admissibility of the cigarettes. We think if it is going to

make recitals in that regard, it should also recite the defendant made a motion to strike the evidence with regard to the cigarettes, and that they be excluded from the consideration of the jury, and the jury instructed to disregard not only the cigarettes themselves, but any testimony with regard to them.

The order, we think, should also show that before the Court indicated that it would be impossible to cure any error caused by the cigarettes having been admitted, that the Court had stated that he could go back and grant one of the defendant's motions for a mistrial, that the defendant objected to this, that at that time the defendant withdrew all of his prior moions for a mistrial.

We would object to the order reciting that the Court declared a mistrial on the basis of the defendant not being in chambers, in order to prevent a manifest injustice to the defendant, we think that was an after-thought, it was not raised until September 3rd, when the argument was had on the other motions.

It is true the record reflects that Mr. Walker made a statement in Court's chambers, I think the very last thing that occurred in Court's chambers, to that effect.

THE COURT: There is no dispute about the defendant not being present, is there?

MR. GREENE: Oh, no, but the Court indicated what he intended to do, the Court indicated his intent to declare a mistrial, before that. And of course, we feel that the order should include the entire record and proceedings, and that they be made a part of the record by this order—that is, the proceedings held in Court chambers upon the consideration of the admissibility of those cigarettes.

MR. WALKER: The proceedings, the record of proceedings, is a part of the record, and that is just picking out one particular part, and you might just as well say you make the whole record of the trial a part of this order, it is a part of this record, and upon review, that would be examined, as well as the rest of the record, I would assume.

THE COURT: I am going to write on here, "Tendered for entry, and Refused." In other words, I have identified this.

MR. GREENE: Yes.

THE COURT: Now, your motion and Plea at Bar.

MR. GREENE: Your Honor, at this time we would tender and ask leave to file a motion and plea in bar, which sets forth the declaration of a mistrial in this case of State of West Virginia against William Dandy, over the objection of the defendant and without his consent, which recites that the defendant on the record moved the Court for a directed verdict of not guilty, that a judgment be entered in favor of the defendant, or alternatively that the indictment be dismissed and the defendant discharged from further prosecution.

The postion of the defendant as shown in said motion is that the defendant has once been in jeopardy, and consequently he should not be brought to trial at this succeeding term of Court. We think that the granting of a mistrial over the defendant's objections, after he had withdrawn all of his prior motions for mistrial, the Court having proceeded before the jury, which was duly impaneled and sworn, for the period of time that transpired in that trial, that the defendant was placed in jeopardy, and we would ask to file this motion and plea in bar to further prosecution.

THE COURT: This files it?

MR. GREENE: Yes, your Honor.

MR. WALKER: That is what I understand, we are not arguing the motion.

THE COURT: Before I rule on any of these, if this first order includes anything contained in here, then in order to keep the record straight I had better not enter any of these orders until the State has had a chance to examine them—as the pleadings stand, there is no demurrer or no denial or admission to your other two motions.

Suppose I give them time to look over these other two orders in relation to the order they have tendered, as to what happened at the end of the trial. Can I hear you on that in the morning?

MR. WALKER: I think so.

MR. GREENE: Yes.

THE COURT: I will take all of this up in the morning, then, Friday morning, and I will withhold all rulings until tomorrow morning, no rulings at all will be made until I have had a chance to go over your other two motions.

* * *

Thereupon, the proceedings in this matter were continued until the 20th day of September, 1963, upon order of the Court.

* * *

IN THE INTERMEDIATE COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, Plaintiff,
v. On a Felony
WILLIAM DANDY, Defendant.

BEFORE: Honorable William J. Thompson, Judge.

* * *

APPEARANCES

For the State: Charles M. Walker, Esq., Prosecuting Attorney; and A. T. Ciccarello, Esq., Assistant Prosecuting Attorney for Kanawha County, West Virginia.

For the Defendant: The Defendant, in person, and by W. Dale Greene, Esq., his attorney.

* * *

BE IT REMEMBERED THAT WHEN the above-styled case again came on for hearing, on the 20th day of September, 1963, being a Friday, during the June, 1963 Term of said Court, pursuant to the adjournment heretofore ordered by the Court, the following proceedings were had, in Chambers, in the presence of the defendant:

MR. GREENE: I do have objections to the entry of the order tendered, I would renew all of my objections made to the order tendered yesterday, and make them all applicable to this order; and further state we specifically object to that portion of the order which states—and we think reflects an untrue reason why the mistrial was granted.

The order as tendered states: "In order to prevent a manifest injustice to the defendant, because of his not being present in

the Court's chambers during a portion of the in-chamber proceedings," that the mistrial was granted. We think that was not the true reason the mistrial was granted, the Court had already indicated it was going to grant a mistrial for the sole reason of the error committed of the admission of the cigarettes, which were illegally seized and presented in evidence.

THE COURT: Suppose the Court had felt inclined to grant a mistrial on that basis, and before the Court granted that mistrial, another reason becomes apparent to the Court? Don't you think the Court has a right to consider that; or does the Court have to be bound by what it considers on the first step?

MR. GREENE: It is our premise the reason the Court stated it was in error in admitting the cigarettes—the Court is bound by that.

THE COURT: You understand when I tell the jury my reason for doing a certain thing, that is not necessary for the Court to do that? I do that as a matter of form out there at times, in order to advise the jury as to what is happening, to give them some reason as to why they don't go on with the trial. I don't see why the Court would be bound by what I told the jury as a reason for granting a mistrial.

MR. GREENE: That would be our position. And in addition, the order does recite, apparently, a determination was made prior to the granting of the mistrial by the Court, it says by implication that, that the non-presence of the defendant in chambers would have resulted in a manifest injustice to the defendant. There are cases in West Virginia where things have happened in trials, where the defendant was not present, and it was not reversible error.

It is our feeling the Court, prior to the time of declaring the mistrial, had made no determination the trial could not go forward for that reason.

So we think that the order, as presented, would have the effect of misleading any appellate court into perhaps believing that such a determination had been made.

THE COURT: Do you have anything you want to add?

MR. WALKER: I want to say that the transcript speaks for

that, the Court agreed to hear us on the matters outlined, then of course it quotes me as saying it had just been brought to my attention the defendant had not been present. I say here, "The defendant has not been present," and so on, "So we couldn't proceed with the trial any further, anyway."

In this order, I didn't put on the end, "To which ruling the defendant objects and excepts," I presume we could write that on there, that is an oversight.

MR. GREENE: We would like to show the objection and exception, not only to the ruling of the Court in refusing to direct a verdict of not guilty, or refusing to dismiss the indictment, and discharge the defendant or to prohibit any further prosecution; but we would like the objection to go further, and say it is an objection to the entry of the order in the form in which it is tendered.

THE COURT: Is that taken care of on the record now, is it necessary to incorporate it in here?

MR. GREENE: I would like a notation we do object and except to the order itself; your Honor. We would also request Mr. Sherwood type up both the proceedings we had yesterday and today, in order that I may make them a part of the petition to the Supreme Court.

(An off-the-record discussion was then held, plus colloquy.)

MR. WALKER: The State moves to strike the defendant's plea of *autrefois acquit*, and motion and plea in Bar filed today, upon the ground that the motion and plea do not correctly state the Court's reasons for granting the mistrial; and upon the further grounds that by the Court's order entered September 20, 1963, the matters and issues raised in said plea and motion were decided in that the defendant on September 3rd, 1963, moved the Court that a verdict of not guilty be entered, or in the alternative that the defendant be discharged from further prosecution, or in the alternative that the State be prohibited from any further prosecution of the defendant, for the reason that the defendant had been in jeopardy, and the Court heard argument of counsel thereon and overruled said motions.

THE COURT: In other words, this matter of jeopardy is one which the Court has already adjudicated, is that right?

MR. WALKER: Yes.

THE COURT: I will order the proceedings taken yesterday and today be made a part of the order sustaining the State's motion to strike the pleas.

MR. GREENE: To the ruling of the Court in sustaining the State's motion to strike the defendant's plea of *autrefois acquit* and the defendant's plea in bar and motion, the defendant, of course, objects and excepts.

May it also be shown on the record the defendant objects and excepts to the withdrawal of the demurrers heretofore filed?

THE COURT: Yes.

(And these were all of the proceedings reported upon the trial of this matter.)

* * *

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

I, ELLIOTT B. SHERWOOD, Official Reporter of the Intermediate Court of said county, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in chambers, as stated in the caption hereof, on the 19th and 20th day of September, 1963, in the trial of State of West Virginia vs. William Dandy, had during the June, 1963 Term of said Court, as reported by me in stenographic characters and transcribed into the English language.

Given under my hand this 25th day of September, 1963.

/s/ ELLIOTT B. SHERWOOD
Official Reporter.

A TRUE CARBON COPY:

_____
Official Reporter.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

And the Court hereby certifies that the foregoing transcript contains all of the proceedings reported upon the trial of this case,

in chambers, upon the 19th and 20th day of September, 1963, together with all of the objections, rulings and exceptions thereto.

W. J. THOMPSON,
Judge of the Intermediate Court.

APPENDIX VIII

ORDER RESETTING CASE FOR TRIAL

(STATE OF WEST VIRGINIA,

At an Intermediate Court for Kanawha County held at the Court House thereof on the 23rd day of September, 1963.)

The State,
)
Vs.)
)
William Dandy

On Indictment for Receiving Stolen Goods. No. 206. (with Norman E. Brown alias "Natie" Brown)

William Dandy, who stands indicted for Felony, this day appeared in Court in answer to his recognizance heretofore entered into, and thereupon the Court sets this case for trial on the 21st day of October, 1963. The defendant to remain on the bond heretofore given.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, LEWIS A. HATCHER, Clerk of the Intermediate Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 7th day of May, 1964.

LEWIS A. HATCHER, Clerk,
Intermediate Court, Kanawha
County, West Virginia.

APPENDIX IX

PETITION OF WRIT OF PROHIBITION FILED OCTOBER 8, 1963, IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Filed, Oct. 8, 1963

Kenneth E. Hines, Clerk of the Supreme Court of Appeals of West Virginia

IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA
ex rel WILLIAM DANDY,
Petitioner,

vs.

PETITION FOR WRIT OF PROHIBITION

WILLIAM THOMPSON, Judge of
The Intermediate Court of Kanawha County,

and,

CHARLES WALKER, Prosecuting Attorney
of Kanawha County, West Virginia,
Respondents.

To the Honorable Judges of the Supreme Court
of Appeals of the State of West Virginia

The undersigned petitioner respectfully represents unto the Court the following:

1. That he was indicted at the June, 1963 Term of the Intermediate Court of Kanawha County, West Virginia, on the 17th day of June, 1963, for a felony on two counts as follows:

2. That upon petitioner's motion he was granted a separate trial from his co-defendant, and his case was set for trial on the 5th day of August, 1963.

3. Upon motion of the petitioner the first count was dropped and petitioner was brought to trial on the Second Count of the Indictment.

4. That the jury was empaneled and duly sworn to try the case between the petitioner and the State of West Virginia on petitioner's plea of Not Guilty on the 5th day of August, 1963.

5. That counsel for the State and counsel for petitioner did thereafter make their respective opening statements to the jury.

6. That the State did call as its first witness Robert Crouse, and did attempt with said witness to introduce into evidence certain cigarettes allegedly obtained by said witness from the petitioner or from the Arcade Tobacco Store, Inc., a business under the control of the petitioner, and to the introduction of such cigarettes, petitioner objected, and petitioner thereupon moved the Court for a preliminary inquiry of fact out of the presence of the jury, regarding the admissibility of said cigarettes, which preliminary inquiry was granted by the Court.

7. Much evidence was heard by the Court in Chambers regarding the admissibility of said cigarettes, which had been obtained without a search warrant, the Court hearing the evidence of many witnesses, and many citations of authority, and argument of counsel, and thereupon did rule that said cigarettes were admissible, and upon resumption of the trial in front of the jury said cigarettes were, over the objection of the petitioner, introduced into evidence. Whereupon at that time petitioner moved for a mistrial, which the Court refused.

8. Thereupon the trial continued and the State called all its witnesses. After the state had rested its case the petitioner, after having his motion for directed verdict overruled, proceeded to call various witnesses in his defense.

9. During the trial petitioner had made a number of motions for mistrial, all of which had been refused by the respondent Trial Judge.

10. Late in the afternoon of the 4th day of trial and after petitioner had called several witnesses for his defense, the Court retired to Chambers and the question of the propriety of admitting the cigarettes into evidence was again raised, and the Court adjourned until the following morning, August 9, 1963, to permit the Prosecuting Attorney to look further into the law in this regard.

11. On Friday morning, the 5th day of trial, August 9, 1963, apparently the Prosecuting Attorney reached the conclusion that petitioner was correct in his original objection to the introduction of said cigarettes, and apparently agreed that said cigarettes were illegally seized and should not have been introduced into evidence.

12. Thereupon petitioner moved to strike all the evidence and all testimony regarding said cigarettes and to remove the cigarettes as exhibits. Whereupon the Court stated "What you have made here is a motion to strike, but the question is whether I can cure the thing after I have let all this evidence about the cigarettes in." Whereupon petitioner requested the Court for a ruling on his motion to strike, and then advised the Court he would move for a directed verdict of acquittal. Whereupon the Court later said, "I wouldn't grant you a directed verdict, but I will give you a mistrial. *Whether they can try it again I don't know.*" Counsel for petitioner then replied, "I don't think a mistrial at this stage, we have gone so far into this matter, I don't think a mistrial at this point would be proper, your Honor." Thereupon later the Court did state, "I would overrule your motion for a directed verdict." Whereupon counsel for petitioner again requested a ruling on his motion to strike and the Court said, "*How can I get all this testimony out about the cigarettes and leave anything for the jury?* That is most of the testimony." Then the following took place:

> "MR. PREISER: I would respectfully request your Honor instruct the jury—this would be my thought at this time—that your Honor instruct the jury that all the evidence regarding the seizure of the cigarettes, all the evidence of any cigarettes in the possession of Dandy, is stricken, that they should not consider the facts of any cigarettes; that the cigarettes themselves should be removed from the presence of the jury, that the jury be instructed they shall disregard any testimony concerning the fact that William Dandy was supposed to have had the cigarettes in his possession or took them to the Arcade basement.
>
> "THE COURT: How is it humanly possible for the jury to separate that?

"MR. PREISER: I don't know that it would be, all I can say, *the defendant would be prejudiced to give him a mistrial.*

"THE COURT: You have made enough motions for a mistrial. All I have to do is go back, change my ruling on one of them.

"MR. PREISER: The case has turned materially for the defendant, evidence may not be available to the defendant that is available here, at another trial. And I think, I am not sure this is the law, but I think unless the defendant consents to a mistrial, I don't think it can be granted.

"THE COURT: *All I would have to do is go back and change one of my rulings.*

"MR. PREISER: *I would object to it,* I think once the evidence of the cigarettes is not admitted, there is nothing to carry this case to the jury on.

"THE COURT: I would have to go into that; I think there is.

"MR. PREISER: *We would like then to proceed, I don't think we want a mistrial,* we would prefer to have the Court instruct the jury—to remove the cigarettes from the consideration of the jury, and strike any testimony concerning the fact the cigarettes were supposed to have been in the possession of the defendant.

"THE COURT: I don't think it would go that far.

"Suppose I take a little recess now, and you all come back in a little while.

"Thereupon, the trial of this case stood in recess."

13. After the aforementioned adjournment the following occurred in the Courts Chambers:

"THE COURT: I am going to declare a mistrial; then if you have something you want to look into, we can consider it at a later date.

"MR. PREISER: First, without waiving any of my

motions I made during the trial, *I withdraw all of my prior motions for a mistrial, as I stated earlier.* I would like to call your Honor's attention to three cases, if I may.

"THE COURT: The question is here whether you may waive such a serious matter as this. If you went on, and the State got a conviction, and then you get out of the case, and somebody else gets to be his attorney and he goes up and it is on the constitutional rights, how can you waive it?

"MR. PREISER: I am saying we are entitled to a directed verdict.

"THE COURT: *I have changed my ruling, and will grant that motion you earlier made.* If you want to be heard on your motion for a directed verdict, I can hear you at a later date. *All you are interested in is the man's jeopardy; if you can establish jeopardy, you are satisfied.*

"MR. PREISER: *I would like to get on the record before your Honor rules, I withdraw my motions for a mistrial, I think that is highly prejudicial to the defendant, it would be coercing or an attempt to coerce a second trial.*

"I would like to refer your Honor to three cases, Gruber vs. State 3 W. Va. 699.

"(Then counsel for defendant quoted from said case.)

"THE COURT: You can still save that right at a later date.

"MR. PREISER: Then, under the ruling in State v. Little, we think to declare a mistrial violates the defendant's rights under the United States Constitution, and Amendments 4, 5, 6 and 14 thereunder, and it violates the rule under Mapp (?) vs. Ohio, and violates the West Virginia Constitution, and also violates the various articles of the United States Constitution.

"The third case, ex parte Flynn, 111 Federal 257, in this case the jury was out for a long time, the Court said the Judge had no right at any time to discharge the jury or declare a mistrial, without the consent of the defendant.

"We think we are entitled to a directed verdict of acquittal, we think if your Honor declines our right to an acquittal, we are entitled to a dismissal of the indictment, the discharge of the defendant; and if your Honor fails to do that, *we are entitled to at least our rights to a jury trial. We don't want a mistrial.*

"We think any attempt to go back and grant my motions for a mistrial made earlier, which I have withdrawn on the record, or even if I hadn't withdrawn them, any attempt on the part of the Court to grant a mistrial, I respectfully submit to the Court, would be circumventing the rights of this defendant to a speedy trial, and a violation of his rights under the Constitution of the United States and the Constitution of West Virginia; plus the fact the trial has taken a superior turn in advantage to the defendant he has been in jeopardy.

"THE COURT: As I stated before, I will hear you on these points at a later date.

"MR. WALKER: I might mention to your Honor, the defendant has not been present during this last session here in chambers, so we could not proceed with the trial any further anyway.

* * *

"Thereupon, the Court, counsel for the respective parties, and the reporter, returned to the courtroom, where, in the presence of the defendant and the jury, the following transpired:

"THE COURT: Ladies and gentlemen of the jury, *because of error which the Court has committed in permitting certain evidence to come into the trial, which the court has concluded was not admissible, I am declaring a mistrial and discharging you from this case.*

("The jury was then discharged.)

"MR. PREISER: If your Honor please, we want to again show our objection to the discharge of the jury, the granting of the mistrial, and again renew our motion that the jury be recalled and the Court direct a verdict for the defendant, and if that is overruled—

"THE COURT: I will hear you on all of those matters on the 27th of August.

"MR. PREISER: We most respectfully move again for a dismissal of the indictment.

"THE COURT: I will hear you then on that. I will continue it, then, to August 30th."

14. Thereafter on September 3, 1963, the Court did again take up petitioner's motions and overruled the same and stated that the case would be reset for trial at the September 1963 Term of said Court, and defendant's counsel should appear on September 23, 1963, at which time the Court would set this case for trial on a day certain.

15. On the 20th day of September, 1963, petitioner did file his plea of autrofois acquit and his plea of double jeopardy, both of which were stricken, over objection of the defendant, and the Court did advise that said case would be set for trial on a day certain September 23, 1963, a certified copy of the Order filing said pleas and a certified copy of said Pleas are attached hereto and marked for identification petitioner's "Exhibits A, B, C and D" respectively and asked to be made a part hereof.

16. Your petitioner was indicted by the Grand Jury for the Intermediate Court of Kanawha County, West Virginia, a court of competent jurisdiction, and brought to trial in said Court upon an indictment held by that Court to be sufficient in form and substance; petitioner was put in jeopardy having undergone four days of trial, the Court then over his objection declaring a mistrial.

17. The Court on September 20th did enter an Order which is dated August 9th, 1963, the defendant having objected to the entry, language, form and conclusions of the Order, a certified copy of said Order which makes the transcript of the proceedings held in Chambers on August 9, 1963, part of said Order, and said transcript being hereto attached and marked for identification petitioner's "Exhibit E" and asked to be made a part hereof, which Order purportedly sets forth the reasons for the mistrial, which reasons are not substantiated by the transcript filed and made a part of said Order.

18. The petitioner, by counsel, has tendered to the Court an Order setting forth the verbal motion of the State to strike the defendant's plea of autrofois acquit and motion and special plea in bar of further prosecution, which said Order in accordance with a ruling of the trial Court files and makes a part thereof the official transcript of the proceedings held on September 19, 1963, and September 20, 1963, said Order has not yet been entered by the Court, the Judge thereof being presently out of the city. A copy of said official transcript for the dates September 19, 1963, and September 20, 1963, is attached hereto and marked for identification petitioner's "Exhibit F" and asked to be made a part hereof; and upon entry of said Order a certified copy of said Order will be supplied to this Honorable Court as an additional Exhibit to the petition filed herein.

19. On the 23rd day of September, 1963, the Court set the case of this petitioner upon said indictment for trial in the Intermediate Court of Kanawha County on the 21st day of October, 1963, to be tried upon the same count, being Count Two of said indictment, a certified copy of said indictment being attached hereto and marked for identification petitioner's "Exhibit G", and asked to be made a part hereof.

20. That at no time was anything done affecting petitioner's rights out of the presence of said petitioner as shown in petitioner's affidavit attached hereto and marked for identification petitioner's "Exhibit H" and asked to be made a part hereof as fully as if completely set out herein; and that at no time was the petitioner's absence, which absence occurred after the Court stated he was going to declare a mistrial, mentioned as any ground of the mistrial, until argument on his motion for acquittal on September 3, 1963, some 3 weeks after the mistrial was granted.

21. That the Order bearing date August 9, 1963, petitioner's "Exhibit E" was not signed by the Trial Judge, or entered or filed until September 20, 1963, as is clearly shown by the last paragraph of said Order.

22. Petitioner further says he is the same William Dandy who was indicted in the Intermediate Court of Kanawha County, West Virginia, on the 17th day of June, 1963, under the indictment marked petitioner's "Exhibit G", and that he is the same

William Dandy who was put to trial upon said indictment in said Court on August 5, 1963, and is the same William Dandy whose case ended in a mistrial granted over his objection on August 9, 1963, and is the same William Dandy who filed his plea of double jeopardy, and autrofois acquit in said Court, and is the same William Dandy that the respondents intend to retry upon said indictment, and in said Court and which retrial has been set by said Court for October 21, 1963, all as is shown in petitioner's affidavit attached hereto as petitioner's "Exhibit I" and asked to be made a part hereof.

23. Petitioner does further say that he has been once put in jeopardy for that which respondents propose to try him at the September 1963 Term of the Intermediate Court of Kanawha County, in violation of the Constitution of the State of West Virginia Article III, Section 5, and in violation of the Constitution of the United States of America the Fifth Amendment thereto, and therefore the Intermediate Court of Kanawha County, West Virginia, is wholly without jurisdiction to act further in this cause, and that its further action, if any, would exceed its jurisdiction and authority, and this petition for writ of prohibition is based upon uncontroverted facts, and that said Court and the Prosecuting Attorney of Kanawha County, West Virginia, will continue to act without jurisdiction and exceed their authority unless they are prohibited from so doing by the lawful process of this Court.

24. That the Court's statement of record, "How can I get all this testimony out about the cigarettes, and leave anything for the jury? This is most of the testimony," clearly indicates that once the Court held the evidence of the cigarettes was inadmissible there was nothing left for the jury to pass on and the Court should have granted petitioner's motion for directed verdict of acquittal, and therefore petitioner has been tried upon the indictment, and the action taken was tantamount to an acquittal, and therefor defendant has been once put in jeopardy for that which respondents propose to try him again.

25. Petitioner says he has no other adequate remedy save for writ of prohibition, and that he has a clear legal right thereto.

26. That petitioner will suffer irreparable damage and injury unless further proceedings in this matter in the Intermediate

Court of Kanawha County, West Virginia, are suspended by Order of this Honorable Court.

27. That the entire transcript of the trial cannot be available for approximately 6 weeks.

PRAYER

Your petitioner therefore prays, that a Rule may be awarded against the said William Thompson, Judge of the Intermediate Court of Kanawha County, West Virginia, and Charles Walker, Prosecuting Attorney of Kanawha County, West Virginia, to show cause, if any, or either of them can, why a writ of prohibition should not be awarded to your petitioner prohibiting the said William Thompson, Judge of the Intermediate Court of Kanawha, County, and Charles Walker, Prosecuting Attorney of Kanawha County, from proceeding further in said action; that a writ of prohibition be awarded to your petitioner, prohibiting the said William Thompson and Charles Walker from continuing to exceed their authority and try this petitioner under said indictment; and to show cause why the indictment found against your petitioner should not be dismissed and the petitioner discharged from further prosecution under said indictment; and that an order be entered by this Honorable Court suspending the proceedings herein sought to be prohibited until the final decision of this cause.

WILLIAM DANDY
By Counsel

STANLEY E. PREISER
W. DALE GREENE
Counsel for Petitioner
3rd Floor - Union Building
Charleston, West Virginia

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

The undersigned WILLIAM DANDY, the petitioner named above, after having been first duly sworn, says that the facts and allegations contained in the hereto annexed petition for writ of prohibition are true, except insofar as they are therein stated to be upon information and belief, and insofar as they are therein

stated to be upon information and belief, he believes them to be true.

WILLIAM DANDY

Taken, subscribed and sworn to before me this 7th day of October, 1963.

My commission expires September 17, 1969.

GLOE L. McCURDY
Notary Public

"PETITIONER'S EXHIBIT A"

(STATE OF WEST VIRGINIA,

At an Intermediate Court for Kanawha County held at the Court House thereof on the 20th day of September, 1963.)

STATE OF WEST VIRGINIA
v.
WILLIAM DANDY

This day came the defendant, William Dandy, by his Attorney, and presented to the Court his written Motion and Plea in Bar praying that in the alternative,

1. That a judgment of not guilty be entered in his favor; or

2. That he be discharged from further prosecution in this case; or

3. That the State be prohibited from further prosecution of this case against the defendant for the reason he has once been in jeopardy; and asked leave to file said written Motion and Plea in Bar, which leave is granted, and said written Motion and Plea in Bar is hereby ORDERED filed.

ENTER:

/s/ W. J. THOMPSON
Judge

DATED: 9-20-63

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, LEWIS A. HATCHER, Clerk of the Intermediate Court for

said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 7th day of October, 1963.

LEWIS A. HATCHER, Clerk,
Intermediate Court, Kanawha
County, West Virginia

"PETITIONER'S EXHIBIT B"

IN THE INTERMEDIATE COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v.

WILLIAM DANDY

MOTION AND PLEA IN BAR

To the Honorable William J. Thompson, Judge of said Court:

Comes now the defendant, William Dandy, and represents unto the Court that at the June 1963 term of the Intermediate Court of Kanawha County, West Virginia, after having previously entered a plea of not guilty, a jury was empaneled and duly sworn to try this case, that after the State had rested its case and after the defense was well along in his case, the Court did grant a mistrial over the objection of the defendant, basing the mistrial upon the Court's error in permitting the State to introduce certain cigarettes into evidence allegedly seized from the defendant or from the Arcade Tobacco Store, Inc., which evidence was introduced over the objection of the defendant, that before and after said mistrial was ordered by the Court over the objection of the defendant, the defendant did upon the record move the Court for a directed verdict of not guilty, that a judgment of not guilty be entered in favor of the defendant, and that the defendant be discharged from further prosecution, all of which the Court said it would take up at a later date.

Defendant now says that he has been placed in jeopardy upon the charge for which he was indicted in this cause in this Court, and that the granting of the mistrial over the objection of this defendant is equivalent to an acquittal, and therefore the defendant respectfully moves the Court in the alternative as follows:

1. That a verdict of not guilty be entered in favor of the defendant;

2. That the defendant be discharged from further prosecution of this cause;

3. The State be prohibited from further prosecuting this defendant upon the matters or things alleged in the indictment against him for the reason he has once been in jeopardy and any further trial would violate his constitutional guarantee by placing him in jeopardy twice for the same alleged offense.

/s/ WILLIAM DANDY

Stanley E. Preiser
Preiser, Weaver & Daugherty
Third Floor Union Building
Charleston, West Virginia
Attorney for Defendant.

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

WILLIAM DANDY, defendant in the hereto annexed Motion and Plea in Bar, being by me first duly sworn according to law, upon his oath says that the facts and allegations therein contained are true, except insofar as they are therein stated to be upon information, and insofar as they are therein stated to be upon information, he believes them to be true.

/s/ WILLIAM DANDY

Taken, subscribed and sworn to before me this 9th day of September, 1963.

My commission expires September 17, 1969.

/s/ GLOE L. McCURDY
Notary Public

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, LEWIS A. HATCHER, Clerk of the Intermediate Court for said County and in said State, do hereby certify that the foregoing

is a true copy as filed in my said office as of the 20th day of September, 1963.

Given under my hand and the seal of said Court this 7th day of October, 1963.

LEWIS A. HATCHER, Clerk,
Intermediate Court, Kanawha
County, West Virginia.

"PETITIONER'S EXHIBIT C"

(STATE OF WEST VIRGINIA,

At an Intermediate Court for Kanawha County held at the Court House thereof on the 20th day of September, 1963.)

STATE OF WEST VIRGINIA

vs.

WILLIAM DANDY

ORDER

This day came the defendant William Dandy and presented to the Court his written Plea of Autrefois Acquit and asked leave to file the same, which leave is granted, and said written motion is hereby ORDERED filed.

ENTER:

/s/ W. J. THOMPSON
Judge

Dated: 9-20-63

Stanley E. Preiser
Preiser, Weaver & Daugherty
Attorney for Defendant.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, LEWIS A. HATCHER, Clerk of the Intermediate Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 7th day of October, 1963.

LEWIS A. HATCHER, Clerk,
Intermediate Court, Kanawha
County, West Virginia.

"PETITIONER'S EXHIBIT A"

IN THE INTERMEDIATE COURT OF KANAWHA COUNTY,
WEST VIRGINIA

STATE OF WEST VIRGINIA
vs.
WILLIAM DANDY

PLEA OF AUTROFOIS ACQUIT

To the Honorable William J. Thompson, Judge of said Court:

And the said William Dandy in his own proper person comes into Court here and having heard the said indictment read says that the State ought not further to prosecute the said indictment against him, the said William Dandy, because he says that heretofore, to-wit, at the Intermediate Court of Kanawha County, West Virginia, June Term 1963 thereof, this defendant did enter a plea of not guilty and thereafter a jury was empaneled and duly sworn to try this case, that after the State had rested its case and after the defense was well along in his case the Court did order a mistrial over the objection of the defendant, basing the mistrial upon the Court's error in permitting the State to introduce certain cigarettes into evidence allegedly seized from the defendant or from the Arcade Tobacco Store, Inc., which evidence was introduced over the objection of the defendant, that after said mistrial was ordered by the Court over the objection of the defendant, the defendant did upon the record move the Court for a directed verdict of not guilty, that a judgment of not guilty be entered in favor of the defendant, and that the defendant be discharged from further prosecution, all of which the Court said it would take up at a later date.

That pursuant to a rule of the Court, on the 3rd day of September, 1963, the Court did hear argument that counsel for the defendant and the Prosecuting Attorney of Kanawha County, West Virginia, upon the defendant's motions aforesaid, and the Court after hearing said arguments overruled said motions and set the case for trial at the September 1963 Term of said Court, as by the record thereof more fully and at large appears; which said ruling remains in full force and effect. And the said William Dandy avers that he, the said William Dandy, and the said William Dandy so indicted and tried as last aforesaid are one and the

same person and no other and different person; and that the felony of which the said William Dandy was so indicted and tried as aforesaid and the felony of which the State intends to try the said William Dandy at the September 1963 Term are one and the same and not different felonies, and this the said William Dandy is ready to verify.

Wherefore he prays judgment that he may be discharged and dismissed by the Court here from the premises in the present indictment specified.

WILLIAM DANDY
By Counsel

Stanley E. Preiser
Preiser, Weaver & Daugherty
3rd Floor - Union Building
Charleston, West Virginia,
Attorney for Defendant.

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

WILLIAM DANDY, defendant in the hereto annexed Plea of Autrofois Acquit, being by me first duly sworn according to law, upon his oath, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be upon information, and insofar as they are therein stated to be upon information, he believes them to be true.

WILLIAM DANDY

Taken, subscrbed and sworn to before me this 16 day of September, 1963.

My commission expires Sept. 17, 1969.

GLOE L. McCURDY
Notary Public

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

LEWIS A. HATCHER, Clerk of the Intermediate Court for said County and in said State, do hereby certify that the foregoing

is a true copy as filed in my said office as of the 20th day of September, 1963.

Given under my hand and the seal of said Court this 7th day of October, 1963.

LEWIS A. HATCHER, Clerk,
Intermediate Court, Kanawha
County, West Virginia.

"PETITIONER'S EXHIBIT E—ORDER"

(STATE OF WEST VIRGINIA,

At an Intermediate Court for Kanawha County held at the Court House thereof on the 9th day of August, 1963.)

STATE OF WEST VIRGINIA

vs.

WILLIAM DANDY

William Dandy, who stands indicted for a felony, this 9th day of August, 1963, appeared in Court to answer his recognizance heretofore entered into, and the jury heretofore empaneled and sworn again appeared in Court pursuant to their adjournment of yesterday, having heard the State's evidence in full and the defendant's evidence in part. The State's evidence included 225 cartons of cigarettes seized without a search warrant in the presence of the defendant and the defendant not having been placed under arrest. Immediately prior to and after the admission of said cigarettes into evidence, the defendant made motions to withdraw a juror and declare a mistrial of the case. All such motions having been overruled the trial proceeded. The State having thereafter rested and the defendant having begun to present evidence, the Court, based on the evidence of the defendant, determined that said cigarettes marked State's Exhibit Number One had been improperly admitted into evidence.

The Court determined that it would be practically impossible to cure the error of having permitted said cigarettes to be introduced as evidence on behalf of the State and that defendant's motion for mistrial should have been granted and it appearing in the certified record that the defendant, William Dandy, was not present at the in-chamber hearing during which the trial was in progress, the Court by reason of the previous motions of

the defendant for a mistrial, which the Court is now of the opinion should have been granted, and for the further reason that the trial of this case had proceeded out of the presence and hearing of the defendant William Dandy, and that the rights of the said William Dandy to be present at all stages of his trial could not be waived, and in fact were not waived, and that as a result thereof a continuation of the trial would have been futile, by reasons of the fact that in the event of conviction the appellate Court would have been required to grant an appeal and reverse the conviction, and to grant a new trial, the Court therefore was of opinion to and did thereby order a mistrial of the said cause, in order to prevent a manifest injustice to the defendant.

It is further ord[redacted] that a transcript of the proceedings, properly certified by the Official Reporter of the Court and by the Court, with respect to the proceedings had in the chambers of the Court both in and out of the presence of the defendant, be filed herewith and made a part of this order.

The defendant having objected to the aforesaid ruling of the Court this case was continued until the 3rd day of September, 1963, at which time the defendant presented argument and brief in support of his motion that a verdict of Not Guilty be entered or in the alternative that the defendant be discharged from further prosecution or in the alternative that the State be prohibited from any further prosecution of the defendant for the reason that the defendant had been in jeopardy and the Court having maturely considered argument of counsel upon said motion does overrule the same, to which rulings of the Court the defendant objects and excepts and to which order, its language and form, the defendant objects and excepts.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, SS:

I, LEWIS A. HATCHER, Clerk of the Intermediate Court for said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 23rd day of September, 1963.

LEWIS A. HATCHER, Clerk,
Intermediate Court, Kanawha County,
West Virginia

"PETITIONER'S EXHIBIT E--TRANSCRIPT"

* * *

PROCEEDINGS had in the case of State of West Virginia vs. William Dandy, in the Intermediate Court of Kanawha County, West Virginia, on Friday, the 9th day of August, 1963, during the June, 1963 Term of said Court, being the fifth day of trial of said case.

BEFORE: Honorable William J. Thompson, Judge, and a Jury.

APPEARANCES

For the State: Charles N. Walker, Esq., Prosecuting Attorney, and A. T. Ciccarello, Esq., Assistant Prosecuting Attorney for Kanawha County.

For the Defendant: Stanley E. Preiser, Esq., and Dale Greene, Esq.

* * *

The trial of this case was resumed on Friday, the 9th day of August, 1963, at 9:30 o'clock a. m., pursuant to the adjournment previously made.

PRESENT: As before noted.

* * *

Thereupon, the Court, counsel for the respective parties, the defendant, and the reporter, again retired to chambers, out of the hearing of the jury, where the following transpired:

THE COURT: What do you have on that point now?

MR. WALKER: If it is all right with the Court, I will let Tom give the Court what we found, and I may add something.

MR. CICCARELLO: We have made a fairly comprehensive research of this problem, and we found this: That sometime ago, that is, before 1961, etc etc.

(The proceeding continued off the record.)

MR. PREISER: Based on that, may I make a motion, your Honor?

THE COURT: Yes.

MR. PREISER: We move now to strike the evidence and all testimony regarding the cigarettes, to remove he cigarettes as exhibits, there has been no evidence of waiver, the evidence put on by the State quite clearly shows they never relied on a waiver. Earlier their reliance was Mr. Dandy had no standing. But the testimony, Nunley's, Bias', clearly shows, and I don't think the State has taken the position there was a waiver, at least, they haven't down to this time.

Now, I think the defendant does have a standing, and we move to strike all the evidence regarding the cigarettes, and all testimony thereto.

THE COURT: The only difficulty, the thing that bothers the Court, if I would hold that there wasn't a waiver, and in light of Nunley's testimony, which will be to the effect that he did make that statement, I don't see how you would say that the officer, talking about getting a search warrant, the way the officer did, Nunley did, in the presence of the defendant, and then going to the Arcade following that, I don't see how that would be freely and voluntarily given.

I can't see that the officer has any right to talk about a search warrant, and not go get it.

MR. PREISER: That is my point, the basis of the motion.

THE COURT: What you have made here is a motion to strike, but the question is whether I can cure the thing after I have let all of this evidence about the cigarettes in.

MR. PREISER: I don't think you can. We would like a ruling, if your Honor please, on our motion to strike. Then I would move the defendant be discharged, and a directed verdict of acquittal be entered for the defendant. It should have been entered at the end of the State's case.

THE COURT: Do you think if I strike the evidence and you go ahead, would that correct it?

MR. PREISER: I think all the testimony regarding the cigarettes should be stricken, along with the evidence itself. If that is done, there is no case made against the defendant. Therefore, I respectfully say to the Court the Court would be obligated to

direct a verdict for the defendant at the end of the State's case, if they have no cigarettes in evidence, and no testimony concerning them. If the cigarettes go out, the testimony about them goes out, also.

We move for a direct verdict of acquittal for the defendant.

THE COURT: I wouldn't grant you a directed verdict, but I will give you a mistrial. Whether they can try it again, I don't know.

MR. PREISER: I don't think I want a mistrial at this stage, we have gone so far into this matter, I don't think a mistrial at this point would be proper, your Honor.

MR. CICCARELLO: A mistrial is proper at any time before the verdict.

MR. PREISER: I am not certain this is the law, I think there are some cases I have read at one time on that.

THE COURT: I would overrule your motion for a directed verdict.

MR. PREISER: How does your Honor rule on striking the cigarettes, and any testimony pertaining thereto.

THE COURT: How can I get all this testimony out about the cigarettes, and leave anything for the jury? That is most of the testimony.

MR. PREISER: I would respectfully request your Honor instruct the jury—this would be my thought at this time—that your Honor instruct the jury that all the evidence regarding the seizure of the cigarettes, all the evidence of any cigarettes in the possession of Dandy, is stricken, that they should not consider the facts of any cigarettes; that the cigarettes themselves should be removed from the presence of the jury, that the jury be instructed they shall disregard any testimony concerning the fact that William Dandy was supposed to have had the cigarettes in his possession, or took them to the Arcade basement.

THE COURT: How is it humanly possible for the jury to separate that?

MR. PREISER: I don't know that it would be, all I can say, the defendant would be prejudiced to give him a mistrial.

THE COURT: You have made enough motions for a mistrial. All I have to do is go back, change my ruling on one of them.

MR. PREISER: The case has turned materially for the defendant, evidence may not be available to the defendant that is available here, at another trial. And I think, I am not sure this is the law, but I think unless the defendant consents to a mistrial, I don't think it can be granted.

THE COURT: All I would have to do is go back and change one of my rulings.

MR. PREISER: I would object to it, I think once the evidence of the cigarettes is not admitted, there is nothing to carry this case to the jury on.

THE COURT: I would have to go into that; I think there is.

MR. PREISER: We would like then to proceed, I don't think we want a mistrial, we would prefer to have the Court instruct the jury — to remove the cigarettes from the consideration of the jury, and strike any testimony concerning the fact the cigarettes were supposed to have been in the possession of the defendant.

THE COURT: I don't think it would go that far.

Suppose I take a little recess now, and you all come back in a little while.

Thereupon, the trial of this case stood in recess.

* * *

(After recess.)

Thereupon the Court, counsel for the respective parties, and the reporter, retired to chambers, out of hearing of the jury, with the defendant not present, where the following transpired:

THE COURT: I am going to declare a mistrial; then if you have something you want to look into, we can consider it at a later date.

MR. PREISER: First, without waiving any of my motions I made during the trial, I withdraw all of my prior motions for a

mistrial, as I stated earlier. I would like to call your Honor's attention to three cases, if I may.

THE COURT: The question is here whether you may waive such a serious matter as this. If you went on, and the State got a conviction, and then you get out of the case, and somebody else gets to be his attorney and he goes up and it is on the constitutional rights, how can you waive it?

MR. PREISER: I am saying we are entitled to a directed verdict.

THE COURT: I have changed my ruling, and will grant that motion you earlier made. If you want to be heard on your motion for a directed verdict, I can hear you at a later date. All you are interested in is the man's jeopardy; if you can establish jeopardy, you are satisfied.

MR PREISER: I would like to get on the record before your Honor rules, I withdraw my motions for a mistrial, I think that is highly prejudicial to the defendant, it would be coercing or an attempt to coerce a second trial.

I would like to refer your Honor to three cases, Gruber vs. State, 3 W. Va. 699.

(Then counsel for defendant quoted from said case.)

THE COURT: You can still save that right at a later date.

MR. PREISER: Then, under the ruling in State vs. Little, we think to declare a mistrial violates the defendant's rights under the United States Constitution, and Amendments 4, 5, 6 and 14 thereunder, and it violates the rule under Mapp (?) vs. Ohio, and violates the West Virginia Constitution, and also violates the various articles of the United States Constitution.

The third case, ex parte Flynn, 111 Federal 257, in this case the jury was out for a long time, the Court said the Judge has no right at any time to discharge the jury or declare a mistrial, without consent of the defendant.

We think we are entitled to a directed verdict of acquittal, we think if your Honor declines our right to an acquittal, we are entitled to a dismissal of the indictment, the discharge of the

defendant; and if your Honor fails to do that, we are entitled to at least our rights to a jury trial. We don't want a mistrial.

We think any attempt to go back and grant my motions for a mistrial made earlier, which I have withdrawn on the record, or even if I hadn't withdrawn them, any attempt on the part of the Court to grant a mistrial, I respectfully submit to the Court, would be circumventing the rights of this defendant to a speedy trial, and a violation of his rights under the Constitution of the United States and the Constitution of West Virginia; plus the fact that trial has taken a superior turn in advantage to the defendant, he has been in jeopardy.

THE COURT: As I stated before, I will hear you on those points at a later date.

MR. WALKER: I might mention to your Honor, the defendant has not been present during this last session here in chambers, so we could not proceed with the trial any further anyway.

* * *

Thereupon, the Court, counsel for the respective parties, and the reporter, returned to the courtroom, where, in the presence of the defendant and the jury, the following transpired:

THE COURT: Ladies and gentlemen of the jury, because of error which the Court has committed in permitting certain evidence to come into the trial, which the Court has concluded was not admissible, I am declaring a mistrial and discharging you from the case.

(The jury was then discharged.)

MR. PREISER: If your Honor please, we want to again show our objection to the discharge of the jury, the granting of the mistrial, and again renew our motion that the jury be recalled and the Court direct a verdict for the defendant, and if that is overruled—

THE COURT: I will hear you on all of those matters on the 27th of August.

MR. PREISER: We most respectfully move again for a dismissal of the indictment.

THE COURT: I will hear you then on that. I will continue it, then, to August 30th.

* * *

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

I, Elliott B. Sherwood, Official Reporter of the Intermediate Court of said County, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in chambers, in the trial of the case of State of West Virginia vs. William Dandy, for a felony, as stated in the caption hereof, had at the June, 1963 Term of said Court, as reported by me in shorthand and transcribed into the English language.

Given under my hand this 19th day of September, 1963.

ELLIOTT B. SHERWOOD
Official Reporter.

"PETITIONER'S EXHIBIT F"

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

This day personally appeared before the undersigned authority, a Notary Public in and for said County and State, W. DALE GREENE, who, after having been first duly sworn according to law, upon his oath, deposes and says:

1. That he is one of counsel for petitioner William Dandy.

2. That he has tendered to the Intermediate Court of Kanawha County, West Virginia, the original copy of an Order which Order sets out the Court's actions and rulings with the objections thereto as made on September 19, 1963, and September 20, 1963, and which said Order in accordance with the Judge's rulings made on those days files and makes a part of said Order the transcript of the proceedings of both of those days.

3. That inasmuch as this affiant and the attorneys for the State have been unable to meet with the Judge for the purpose of having said Order entered, said Judge being out of the city, said affiant attaches hereto and asks that it be made a part of the petition herein the transcript of the proceedings had in the

Court's Chambers on each of the aforesaid dates, and further states that upon entry of said Order a certified copy of said Order will be supplied to this Honorable Court as an additional Exhibit to the petition filed herein.

Further this affiant saith naught.

W. DALE GREENE

Taken, subscribed and sworn to before me this 7th day of October, 1963.

My commission expires September 17, 1969.

GLOE L. McCURDY
Notary Public

* * *

IN THE INTERMEDIATE COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

v. On a Felony

WILLIAM DANDY,
Defendant.

BEFORE: Honorable William J. Thompson, Judge.

* * *

APPEARANCES

For the State: Charles M. Walker, Esq., Prosecuting Attorney for Kanawha County, West Virginia.

For the Defendant: The Defendant, William Dandy, in person, and by Dale Greene, Esq., his attorney.

* * *

BE IT REMEMBERED THAT WHEN the above-styled case again came on for hearing, on the 19th day of September, 1963, being a Thursday, during the June, 1963 Term of said Court, pursuant to the adjournment heretofore ordered by the Court, the following proceedings were had, in Chambers:

THE COURT: Let the record show that the defendant tendered this order, and the State objected to the Court signing it;

then the State tendered another order, and the defendant objected to the introduction of that order; and the Court entered the order tendered by the State.

MR. GREENE: Your Honor, for the record, we would like to be a little more specific to our objection to the State's order the Court indicated he will enter.

THE COURT: Yes

MR. GREENE: May I go ahead?

THE COURT: Yes.

MR. GREENE: First of all, we object to the entry of the order itself, we object to the conclusions shown in the order. We don't believe that the order clearly and accurately reflects what happened. We think that if the order is going to show certain conclusions therein, with regard to one place I think it states after hearing certain new evidence, the Court again took under determination the admissibility of the cigarettes. We think if it is going to make recitals in that regard, it should also recite the defendant made a motion to strike the evidence with regard to the cigarettes, and that they be excluded from the consideration of the jury, and the jury instructed to disregard not only the cigarettes themselves, but any testimony with regard to them.

The order, we think, should also show that before the Court indicated that it would be impossible to cure any error caused by the cigarettes having been admitted, that the Court had stated that he could go back and grant one of the defendant's motions for a mistrial, that the defendant objected to this, that at that time the defendant withdrew all of his prior motions for a mistrial.

We would object to the order reciting that the Court declared a mistrial on the basis of the defendant not being in chambers, in order to prevent a manifest injustice to the defendant, we think that was an after-thought it was not raised until September 3rd, when the argument was had on the other motions.

It is true the record reflects that Mr. Walker made a statement in Court's chambers, I think the very last thing that occurred in Court's chambers, to that effect.

THE COURT: There is no dispute about the defendant not being present, is there?

MR. GREENE: Oh, no, but the Court indicated what he intended to do, the Court indicated his intent to declare a mistrial, before that. And of course, we feel that the order should include the entire record and proceedings, and that they be made a part of the record by this order—that is, the proceedings held in Court chambers upon the consideration of the admissability of those cigarettes.

MR. WALKER: The proceedings, the record of proceedings, is a part of the record, and that is just picking out one particular part, and you might just as well say you make the whole record of the trial a part of this order, it is part of this record, and upon review, that would be examined, as well as the rest of the record, I would assume.

THE COURT: I am going to write on here, "Tendered for entry, and Refused." In other words, I have identified this.

MR. GREENE: Yes.

THE COURT: Now, your motion and Plea at Bar.

MR. GREENE: Your Honor, at this time we would tender and ask leave to file a motion and plea in bar, which sets forth the declaration of a mistrial in this case of State of West Virginia against William Dandy, over the objection of the defendant and without his consent, which recites that the defendant on the record moved the Court for a directed verdict of not guilty, that a judgment be entered in favor of the defendant, or alternatively that the indictment be dismissed and the defendant discharged from further prosecution.

The position of the defendant as shown in said motion is that the defendant has once been in jeopardy, and consequently he should not be brought to trial at this succeeding term of Court. We think that the granting of a mistrial over the defendant's objections, after he had withdrawn all of his prior motions for mistrial, the Court having proceeded before the jury, which was duly impaneled and sworn, for the period of time that transpired in that trial, that the defendant was placed in jeopardy, and we would ask to file this motion and plea in bar to further prosecution.

THE COURT: This files it?

MR. GREENE: Yes, your Honor.

MR. WALKER: That is what I understand, we are not arguing the motion.

THE COURT: Before I rule on any of these, if this first order includes anything contained in here, then in order to keep the record straight I had better not enter any of these orders until the State has had a chance to examine them—as the pleadings stand, there is no demurrer or no denial or admission to your other two motions.

Suppose I give them time to look over these other two orders in relation to the order they have tendered, as to what happened at the end of the trial. Can I hear you on that in the morning?

MR. WALKER: I think so.

MR. GREENE: Yes.

THE COURT: I will take all of this up in the morning, then, Friday morning, and I will withhold all rulings until tomorow morning, no rulings at all will be made until I have had a chance to go over your other two motions.

* * *

Thereupon, the proceedings in this matter were continued until the 20th day of September, 1963, upon order of the Court.

* * *

IN THE INTERMEDIATE COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

v. On a Felony

WILLIAM DANDY,
Defendant.

BEFORE: Honorable William J. Thompson, Judge.

* * *

APPEARANCES

For the State: Charles M. Walker, Esq., Prosecuting Attorney;

and A. T. Ciccarello, Esq., Assistant Prosecuting Attorney for Kanawha County, West Virginia.

For the Defendant: The Defendant, in person, and by W. Dale Greene, Esq., his attorney.

* * *

BE IT REMEMBERED THAT WHEN the above-styled case again came on for hearing, on the 20th day of September, 1963, being a Friday, during the June, 1963 Term of said Court, pursuant to the adjournment heretofore ordered by the Court, the following proceedings were had, in Chambers, in the presence of the defendant:

MR. GREENE: I do have objections to the entry of the order tendered, I would renew all of my objections made to the order tendered yesterday and make them all applicable to this order; and further state we specifically object to that portion of the order which states — and we think reflects an untrue reason why the mistrial was granted.

The order as tendered states: "In order to prevent a manifest injustice to the defendant, because of his not being present in the Court's chambers during a portion of the in-chamber proceedings," that the mistrial was granted. We think that was not the true reason the mistrial was granted, the Court had already indicated it was going to grant a mistrial for the sole reason of the error committed of the admission of the cigarettes, which were illegally seized and presented in evidence.

THE COURT: Suppose the Court had felt inclined to grant a mistrial on that basis, and before the Court granted that mistrial, another reason becomes apparent to the Court? Don't you think the Court has a right to consider that; or does the Court have to be bound by what it considered on the first step?

MR. GREENE: It is our premise the reason the Court stated it was in error in admitting the cigarettes—the Court is bound by that.

THE COURT: You understand when I tell the jury my reason for doing a certain thing, that is not necessary for the Court to do that? I do that as a matter of form out there at times, in order to advise the jury as to what is happening, to give them

some reason as to why they don't go on with the trial. I don't see why the Court would be bound by what I told the jury as a reason for granting a mistrial.

MR. GREENE: That would be our position. And in addition, the order does recite, apparently, a determination was made prior to the granting of the mistrial by the Court, it says by implication on that, that the non-presence of the defendant in chambers would have resulted in a manifest injustice to the defendant. There are cases in West Virginia where things have happened in trials, where the defendant was not present, and it was not reversible error.

It is our feeling the Court, prior to the time of declaring the mistrial, had made no determination the trial could not go forward for that reason.

So we think that the order, as presented, would have the effect of misleading any appellate court into perhaps believing that such a determination had been made.

THE COURT: Do you have anything you want to add?

MR. WALKER: I want to say that the transcript speaks for that, the Court agreed to hear us on the matters outlined, then of course it quotes me as saying it had just been brought to my attention the defendant had not been present. I say here, "The defendant has not been present," and so on, "So we couldn't proceed with the trial any further, anyway."

In this order, I didn't put on the end, "To which ruling the defendant objects and excepts," and I presume we could write that on there, that is an oversight.

MR. GREENE: We would like to show the objection and exception, not only to the ruling of the Court in refusing to direct a verdict of not guilty, or refusing to dismiss the indictment, and discharge the defendant or to prohibit any further prosecution; but we would like the objection to go further, and say it is an objection to the entry of the order in the form in which it is tendered.

THE COURT: Is that taken care of on the record now, is it necessary to incorporate it in here?

MR. GREENE: I would like a notation we do object and except to the order itself, Your Honor. We would also request Mr. Sherwood type up both the proceedings we had yesterday and today, in order that I may make them a part of the petition to the Supreme Court.

(An off-the-record discussion was then held, plus colloquy.)

MR. WALKER: The State moves to strike the defendant's pleas of *autrefois acquit*, and motion and plea in Bar filed today, upon the ground that the motion and plea do not correctly state the Court's reasons for granting the mistrial; and upon the further grounds that by the Court's order entered September 20, 1963, the matters and issues raised in said plea and motion were decided in that the defendant on September 3rd, 1963, moved the Court that a verdict of not guil[illegible] be entered, or in the alternative that the defendant be discharged from further prosecution, or in the alternative that the State be prohibited from any further prosecution of the defendant, for the reasons that the defendant had been in jeopardy, and the Court heard argument of counsel thereon and overruled said motions.

THE COURT: In other words, this matter of jeopardy is one which the Court has already adjudicated, is that right?

MR. WALKER: Yes.

THE COURT: I will order the proceedings taken yesterday and today be made a part of the order sustaining the State's motion to strike the pleas.

MR. GREENE: To the ruling of the Court in sustaining the State's motion to strike the defendant's pleas of *autrefois acquit* and the defendant's plea in bar and motion, the defendant, of course, objects and excepts.

May it also be shown on the record the defendant objects and excepts to the withdrawal of the demurrers heretofore filed?

THE COURT: Yes.

(And these were all of the proceedings reported upon the trial of this matter.)

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

I, Elliott B. Sherwood, Official Reporter of the Intermediate Court of said county, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in chambers, as stated in the caption hereof, on the 19th and 20th day of September, 1963, in the trial of State of West Virginia vs. William Dandy, had during the June, 1963 Term of said Court, as reported by me in stenographic characters and transcribed into the English language.

Given under my hand this 25th day of September, 1963.

/s/ ELLIOTT B. SHERWOOD
Official Reporter.

A TRUE CARBON COPY:
Elliott B. Sherwood
Official Reporter

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

And the Court hereby certifies that the foregoing transcript contains all of the proceedings reported upon the trial of this case, upon the 19th and 20th day of September, 1963, together with all of the objections, rulings and exceptions thereto.

W. J. THOMPSON
Judge of the Intermediate Court

"PETITIONER'S EXHIBIT G"

State of West Virginia, Kanawha County, ss:

IN THE INTERMEDIATE COURT OF SAID COUNTY:

The Grand Jurors of the State of West Virginia, in and for the body of the County of Kanawha, and now attending the said Court, upon their oaths present, that WILLIAM DANDY and NORMAN E. BROWN, alias "Natie" Brown, within one year next prior to the date of the finding of this Indictment, in said County of Kanawha, three thousand five hundred thirteen packages of

cigarettes of assorted brands, all of the value of $1,053.90 of the goods and chattels of Champion Pyramid Vendors, Inc., a corporation, then and there being found, then and there unlawfully and feloniously did steal, take, and carry away, against the peace and dignity of the State.

SECOND COUNT: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said WILLIAM DANDY and NORMAN E. BROWN, alias "Natie" Brown within one year next, prior to the date of the finding of this Indictment, in the said County of Kanawha, did unlawfully and feloniously buy and receive from some evilly disposed persons to the Grand Jurors unknown and aid in concealing and transfer to a person other than Champion Pyramid Vendors, Inc., a corporation, the owner thereof, three thousand five hundred thirteen packages of cigarettes of assorted brands, all of the value of $1,053.90, which said property had been unlawfully and feloniously stolen, taken, and carried away from the said owner by some evilly disposed persons to the Grand Jurors unknown the said WILLIAM DANDY and NORMAN E. BROWN, alias "Natie" Brown well knowing and having reason to believe that said goods and chattels had been unlawfully and feloniously stolen, taken, and carried away, against the peace and dignity of the State.

Found at the JUNE Term of said Court, 1963, upon the information of Capt. George Nunley, CPD, Charleston, W. Va.
Det. Robert Crouse, CPD, Charleston, W. Va.

sworn in open Court and sent before the Grand Jury to give evidence to that body.

CHARLES M. WALKER
Prosecuting Attorney

"PETITIONER'S EXHIBIT H"

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

This day personally appeared before the undersigned authority, William Dandy, who, after having been first duly sworn according to law, upon his oath, deposes and says:

1. That he is the defendant in the case styled State of West Virginia vs. William Dandy pending in the Intermediate Court of Kanawha County, West Virginia, and was present at all proceedings held in said case through the last adjournment prior to the declaration of a mistrial in said case. That on the morning of August 9, 1963, he was present in the Chambers of the Judge of the Intermediate Court of Kanawha County, West Virginia; that during said in Chambers proceedings and prior to any adjournment thereof said Judge did make it abundantly clear that he was going to declare a mistrial for error in introducting cigarettes in evidence, by the State, and that he was present until the adjournment; that he has read the transcript of the proceedings of August 9, 1963, including that portion of the transcript following the adjournment had on said day and said transcript reflects that the first thing that occurred following said adjournment was the Court's statement "I am going to declare a mistrial. . ."

2. That the sole reason for the declaration of the mistrial was an error committed by the Court in permitting into evidence cigarettes illegally seized; that in this affiants presence the Court said it could change a prior ruling and grant a mistrial; that this defendant's counsel at no time moved for mistrial on the basis of his non-presence; that the first time any mention of his absence as a grounds for mistrial was made was at a hearing held on September 3, 1963, regarding the right of the State to retry him; that there was no motion made for mistrial on the basis of defendant's non-presence; that defendant, your affiant, was present before the jury when said Judge announced to the jury that he was discharging them because of an error committed by the Court in admitting certain evidence before them.

And further this affiant saith naught.

WILLIAM DANDY

Taken, subscribed and sworn to before me this 7th day of October, 1963.

My commission expires September 17, 1969.

GLOE L. McCURDY
Notary Public

"PETITIONER'S EXHIBIT I"

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

This day personally appeared before the undersigned authority, William Dandy, who, after having been first duly sworn according to law, upon his oath, says:

1. That he is the same William Dandy who was indicted in the Intermediate Court of Kanawha County, West Virginia, on the 17th day of June, 1963, under the indictment marked Petitioner's Exhibit G filed with said petition.

2. That he is the same William Dandy who was put to trial upon said indictment in said Court on August 5, 1963, and is the same William Dandy whose case ended in a mistrial declared over his objection on August 9, 1963.

4. That he is the same William Dandy who filed his written plea of autrofois acquit and motion and special plea in bar of further prosecution in said Court, and his verbal motion that he be discharged because of double jeopardy, in said Court.

5. That he is the same William Dandy who is scheduled to be retried on October 21, 1963, in said Court, on the same indictment and on the same court thereof charging the same offense for which he has once been tried, in said Court.

And further affiant saith naught.

WILLIAM DANDY

Taken, subscribed and sworn to before me this 7th day of October, 1963.

My commission expires September 17, 1969.

GLOE L. McCURDY
Notary Public

APPENDIX X

RULE TO SHOW CAUSE

STATE OF WEST VIRGINIA,

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 14th day of October, 1963, the following order was made and entered, to-wit:

State of West Virginia ex rel. William Dandy, Realtor
vs. Prohibition
William Thompson, Judge of The Intermediate Court of Kanawha County, and Charles Walker, Prosecuting Attorney of Kanawha County, West Virginia, Respondents

On a former day, to-wit, October 8, 1963, came the State of West Virginia at the relation of William Dandy, by Stanley E. Preiser, and W. Dale Greene, his attorneys, and presented to the Court his petition, and exhibits, and note of argument in support thereof, praying for a writ of prohibition to be directed against William Thompson, Judge of The Intermediate Court of Kanawha County, and Charles Walker, Prosecuting Attorney of Kanawha County, West Virginia, as therein set forth.

Upon consideration whereof, the Court is of opinion that a rule should be awarded herein. It is therefore considered and ordered by the Court that a rule do issue, directed against William Thompson, Judge of The Intermediate Court of Kanawha County, and Charles Walker, Prosecuting Attorney of Kanawha County, West Virginia, returnable before this Court at its court room in the City of Charleston, County of Kanawha, at ten o'clock a. m., on Tuesday, October 22, 1963, commanding and directing the said respondents to show cause, if any they can, why a writ of prohibition should not be awarded against them as prayed for by the relator in his said petition.

It is further considered and ordered that all proceedings in the trial court, sought to be prohibited herein, be, and the same are hereby suspended until the final adjudication of this proceeding in this Court.

Service of a copy of this order upon the aforesaid respondents, together with a copy of the petition and exhibits filed herein, shall

have the same effect as the service of a formal rule, and notice to suspend all proceedings in the trial court aforesaid. Judge Browning absent.

A True Copy

Attest: KENNETH E. HINES,
Clerk Supreme Court of Appeals

APPENDIX XI

WRITTEN OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Filed Feb. 25, 1964. Kenneth E. Hines, Clerk of the Supreme Court of Appeals of West Virginia.

No. 12285

STATE EX REL. WILLIAM DANDY

v.

WILLIAM THOMPSON, JUDGE, ETC., ET AL.

Prohibition Writ denied.

Caplan, Judge

1. Where the trial court erroneously permits inadmissible matters to be introduced into evidence, such error does not create a mar . necessity for a mistrial within the meaning and intent of Code, 1931, 62-3-7.

2. "The 'manifest necessity' in a criminal case permitting the discharge of a jury without rendering a verdict may arise from various circumstances. Whatever the circumstances, they must be forceful to meet the statutory prescription." Point 2, Syllabus, *State* v. *Little*, 120 W. Va. 213.

3. In a criminal trial the record must affirmatively show the presence of the accused during all parts of the trial wherein any action is taken that may affect his rights, and when the record affirmatively shows the absence of the accused during a material portion of the trial such absence constitutes a manifest necessity sufficient to permit the court to declare a mistrial.

4. The presence of the accused in a criminal trial is required during the argument on a motion for a mistrial.

5. " 'It makes no difference upon what ground the court below decided the case, or the particular matter complained of, it is not the reasons assigned upon which the court decided a question that is to be reviewed, but the action of the court itself; and the question always in the appellate court is, whether the judgment to be reviewed is correct.' *Shrewsbury* v. *Miller*, 10 W. Va. 115, Pt. 3, Syllabus." Point 5, Syllabus, *Rollins* v. *Daraban*, 145 W. Va. 178.

Caplan, Judge:

In this original proceeding, instituted in this Court on October 8, 1963, the petitioner, William Dandy, seeks a writ to prohibit the defendants, Honorable William Thompson, Judge of the Intermediate Court of Kanawha County, and Charles Walker, Prosecuting Attorney of Kanawha County, from proceeding further in the prosecution of the petitioner upon that certain felony indictment returned by the Grand Jury of Kanawha County at the June Term, 1963, of said court. The petitioner further seeks the dismissal of that indictment.

On October 14, 1963, this Court granted a rule against the defendants returnable October 22, 1963. At the request of the defendants for additional time in which to take further evidence, the case was continued until the January Term, 1964. This case was submitted for decision on January 8, 1964, upon the pleadings and depositions and upon the briefs and arguments of counsel.

William Dandy was indicted for a felony on two counts. Upon his motion the first count was dismissed. He was then brought to trial on the second count which charged him with buying and receiving, aiding in concealing and transferring certain stolen cigarettes to a person other than the owner thereof.

During the first day of the trial, August 5, 1963, the State, through its first witness, attempted to introduce into evidence certain cigarettes allegedly obtained by that witness. The petitioner objected to the admission of such cigarettes in evidence, claiming that the building from which they were taken was under the control of the petitioner and that such evidence was inadmissible inasmuch as it was seized without a search warrant.

The court, the petitioner and counsel for both parties then retired to chambers for the purpose of determining the admissibility of the cigarettes in evidence. Upon the hearing of evidence and argument of counsel the court concluded that the cigarettes were admissible. Subsequently, in open court and before the jury, the cigarettes in question were admitted as evidence in the case. The petitioner objected to the court's action and moved for a mistrial. This motion was overruled by the court. It appears from the record of the proceedings below that numerous motions for a mistrial were made on behalf of the petitioner during the trial.

After the State had concluded its case and had rested, the petitioner made several motions to exclude certain evidence and made further motions for a directed verdict, all of which were overruled by the court. The petitioner then proceeded with his defense. Thereafter, on August 8th, 1963, certain evidence was introduced which tended to support the petitioner's theory relating to the admissibility of the cigarettes, the question into which inquiry had been made earlier in the trial. At this point the court declared a recess and requested the prosecuting attorney to further examine the law in regard to the admissibility of the cigarettes and to report his findings the next morning.

Upon complying with the court's request, the prosecuting attorney, on the morning of August 9, 1963, reported to the court that his research revealed that the petitioner had a legal right to object to the search and, since the cigarettes were seized without a search warrant, they were inadmissible as evidence in the case. This session took place in the judge's chambers in the presence of the petitioner and his counsel. The petitioner, through his counsel, then moved to strike all of the testimony concerning the cigarettes and further moved to exclude the cigarettes as exhibits. The court expressed doubt that the error could be cured by a motion to strike the evidence. Counsel for the petitioner stated that if his motion to strike were granted the State's case could not be proved and that the petitioner would be entitled to a directed verdict of acquittal, for which he then moved. The court said it would not grant a directed verdict in favor of the petitioner, but would declare a mistrial. Defense counsel opposed the declaration of a mistrial and, after much discussion on this point, the court took a short recess.

After the recess, the record begins as follows: "Thereupon, the Court, counsel for the respective parties, and the reporter, retired to chambers, out of the hearing of the jury, with the defendant not present, where the following transpired:

"THE COURT: I am going to declare a mistrial; then if you have something you want to look into, we can consider it at a later date * * *."

Further resisting the action of the court in declaring a mistrial, counsel for the petitioner withdrew all prior motions for a mistrial and argued his position at length. Following further discussion between the court and counsel, the prosecuting attorney noted: "I might mention to your Honor, the defendant has not been present during this last session here in chambers, so we could not proceed with the trial any further anyway."

Immediately thereafter, the court, counsel and reporter returned to the courtroom where, in the presence of the petitioner, the court addressed the jury as follows: "Ladies and gentlemen of the jury, because of error which the court has committed in permitting certain evidence to come into the trial, which the Court has concluded was not admissible, I am declaring a mistrial and discharging you from the case." Defense counsel objected to the action of the court and again moved for a directed verdict and a dismissal of the indictment. Hearing on these motions was set for August 30, 1963, and then continued until September 3, 1963.

Further hearings were held on September 3, 19 and 20, 1963, during which the petitioner filed motions of autrefois acquit and pleas in bar to further prosecution of that case. Arguments were heard on these motions and the court and counsel discussed the order to be entered. The motions of the petitioner were promptly overruled. The court entered its order declaring a mistrial, stating its reasons therefor and overruling certain motions of the petitioner. The order apparently was entered on September 20, 1963, although it appears in the order book of the Intermediate Court as of August 9, 1963.

The reasons stated by the court for declaring a mistrial were objected to by the petitioner and gave rise to the principal questions to be resolved in this proceeding. As reflected by the order,

the court declared a mistrial because it had erred in permitting the cigarettes and the testimony pertaining thereto to be introduced into evidence, and for the additional reason that the petitioner was not present during a portion of the trial. The latter reason refers to the second session in the judge's chambers on August 9, 1963, the transcript of the record thereof showing the absence of petitioner.

Many issues are raised in this proceeding, but the controlling question is whether there was a manifest necessity for the court to declare a mistrial for the reasons stated by it, namely, the allowing of inadmissible evidence over the objection of the petitioner, and the absence of petitioner during part of the trial. It is vigorously asserted on behalf of the petitioner that it was improper for the court to declare a mistrial by reason of its allowing inadmissible evidence; that petitioner's motion to strike the evidence and subsequent motions for a directed verdict should have been granted; and that the court's failure to so act should preclude further prosecution of this matter. The petitioner further urges that the mistrial could not be declared because of the absence of the petitioner for the reason that the court did not so state to the jury. Concerning the question of the petitioner's absence, depostions taken in this Court show, and it is readily admitted by the petitioner, that he was absent during a part of the proceedings in the court below. The petitioner nonetheless claims that since the court did not originally state that fact as a reason for granting a mistrial and, further, did not so inform the jury, it could not now validly declare a mistrial on that ground. Also, the petitioner claims that if he were absent, such absence did not occur during a material part of the trial.

Let us now consider the first ground assigned by the court for ordering a mistrial, namely, that it improperly permitted inadmissible evidence to be introduced into the case over the objection of the then defendant. In order for this to be proper and to prevent the mistrial from resulting in an acquittal, his action must satisfy the provisions of Code, 1931, 62-3-7. That section reads in part: "And in any criminal case the court may discharge the jury, when it appears that they cannot agree in a verdict, or that there is manifest necessity for such discharge."

There being no question of disagreement by the jury, the issue

presented is: "Does mere error on the part of the trial court create a manifest necessity for a mistrial? We are firmly of the opinion that it does not. "The 'manifest necessity' in a criminal case permitting the discharge of a jury without rendering a verdict may arise from various circumstances. Whatever the circumstances, they must be forceful to meet the statutory prescription." Point 2, Syllabus, *State* v. *Little,* 120 W. Va. 213, 197 S. E. 626. While the term "manifest necessity" has not been abstractly defined, we view it as the happening of an event, beyond the control of the court, which would require the discharge of the jury and would permit a new trial without justifying a plea of double jeopardy. Such occurrences as the illness or death of a juror, the accused, the judge or counsel exemplify cases in which a manifest necessity exists which would warrant the discharge of the jury. In other words, where unforeseeable circumstances arise during the trial, making its completion impossible, a manifest necessity to discharge the jury exists and the defendant may again be tried.

However, as in the instant case, where the reason relied upon for discharging the jury, after the trial had begun and before a verdict, was an erroneous ruling of the court, a manifest necessity does not exist so as to meet the requirements of Code, 1931, 62-3-7. It was stated in Point 3 of the Syllabus of *State* v. *Little,* 120 W. Va. 213, 197 S. E. 626, "The power of a court in a criminal case to discharge a jury without rendering a verdict is discretionary; but the power 'is a delicate and highly important trust' and must be exercised soundly, else the discharge will become in effect an acquittal of the accused under the Constitution, Article 3, Section 5, which inhibits second jeopardy." That language illustrates the necessity for the proper exercise of discretion in such case.

Where the ground upon which the court relied to discharge the jury was a circumstance over which the court had control and which, by the exercise of due diligence, it could have prevented, no manifest necessity existed which would warrant the declaration of a mistrial. The action of the court, of which the petitioner here complains, was predicated, in part, on its own erroneous ruling. This was a matter over which the court had control. If the trial judge was satisfied that his former ruling in allowing certain evidence was wrong, he could have corrected

it by granting the motion to strike. It is not the province of the court to determine whether the jury could or could not find a defendant guilty without such evidence. Once the trial begins jeopardy attaches and remains unless removed under the provisions of Code, 1931, 62-3-7. If such provisions are not satisfied the defendant is entitled to plead former jeopardy and thus avoid further prosecution on the charge.

The following statement, to which we subscribe, is contained in *State* v. *Whitman,* 93 Utah 557, 74 P. 2d 696:

"It is not altogether, and at all times, within the discretion of the court to stop the prosecution and still hold the accused to answer to the same offense on a future charge. It may discharge the jury under peculiar circumstances in cases of necessity, for circumstances of such nature that neither the court nor the attorney nor the parties have any control over them. But to warrant this course there should be some emergency over which neither court nor attorney has control. State v. Callendine, 8 Iowa 288. We do not mean at present to define or designate any of the cases in which this practice may be pursued, but we all agree that a defendant ought in no case to be put on a second trial for the same offense where the jury has been discharged over defendant's objection, because the court did not like the conduct of counsel or because the court may feel it has erred in prior rulings."

We are of the opinion that the trial court abused its discretion in discharging the jury and declaring a mistrial for the reason that it had erroneously permitted, over the objection of the petitioner, certain evidence to be introduced. If this were the only basis for the court's action, the petitioner would be entitled to the relief he herein seeks.

A second reason, however, for declaring a mistrial was included in the order of the court. That order contained the following language: "* * * and for the further reason that the trial of this case had proceeded out of the presence and hearing of the defendant William Dandy, * * * and that as a result thereof a continuation of the trial would have been futile, * * *." The issue presented is whether the petitioner's absence during part of the trial constituted a manifest necessity for declaring a mistrial as provided in Code, 1931, 62-3-7, and Code, 1931, 62-3-2.

Factually, there is no dispute on this point. The transcript of the record of the trial below shows that William Dandy was absent during the second session in the judge's chambers on August 9, 1963. Furthermore, the petitioner admits in his deposition that he was absent during most of that session and such absence is readily admitted on the record by his counsel. He does contend that nothing took place during his absence which materially affected his rights.

Code, 1931, 62-3-2, provides in part that "A person indicted for felony shall be personally present during the trial therefor." In a long line of cases dating from 1868 to 1962, this Court has held that it is mandatory, under the above statute, for one charged with a felony to be present in person when any step affecting him is taken from arraignment to and including final judgment. *State* v. *Vance,* 146 W. Va. 935, 124 S. E. 2d 252; *Dye* v. *Skeen,* 135 W. Va. 90, 62 S. E. 2d 681, 24 A.L.R. 2d 1234; *State* v. *Martin,* 120 W. Va. 229, 197 S. E. 727; *State* v. *Howerton,* 100 W. Va. 501, 130 S. E. 655; *State* v. *McCausland,* 82 W. Va. 525, 96 S. E. 938; *State* v. *Snider,* 81 W. Va. 522, 94 S. E. 981; *State* v. *Grove,* 74 W. Va. 702, 82 S. E. 1019; *State* v. *Sutter,* 71 W. Va. 371, 76 S. E. 811, 43 L.R.A., N.S., 399; *State* v. *Stevenson,* 64 W. Va. 392, 62 S. E. 688, 19 L.R.A., N.S., 713; *State* v. *Detwiler,* 60 W. Va. 583, 55 S. E. 654; *State* v. *Parsons,* 39 W. Va. 464, 19 S. E. 876; *State* v. *Greer,* 22 W. Va. 800.

This statute, Code, 1931, 62-3-2, has been considered by the courts throughout the years and has been applied with great strictness in favor of the defendant. The right of an accused to be present at all stages of his trial has been deemed to be an inalienable right. *State* v. *Vance,* 146 W. Va. 925, 124 S. E. 2d 252. The statute embodies the rule which existed at common law and was designed to protect a person accused of crime. This does not mean that the rule should be abrogated when, in a unique circumstance, it appears to affect the accused adversely. The protection of our inalienable rights is the very foundation stone of our liberty and law. If we permit the mitigation thereof by making exceptions thereto the ultimate result might be the loss of such rights. Our statute would be meaningless and one's right to be present during every stage of his trial may no longer exist. So long as Code, 1931, 62-3-2, guarantees this right it should be strictly applied.

That the presence of an accused during his trial is of utmost import is reflected by the following language found in 23 C.J.S., Criminal Law, Section 973: "It has been broadly stated that a leading principle that pervades the entire law of criminal procedure is that, after indictment has been found, nothing shall be done in the absence of the prisoner. It is the duty of accused to be present at the trial, and, in the absence of a permissible waiver, under constitutional or statutory provisions to that effect and at common law, an accused charged with a felony is entitled to be present, and, for a valid trial and conviction, must be present, at every stage of the trial, or at least when any important or substantive step is taken."

In *State* v. *Howerton*, 100 W. Va. 501, 130 S. E. 655, the Court held that an accused must be present in his own proper person from the inception of the trial upon the indictment to the final judgment, inclusive, when anything is done affecting him; and this rule applies to his presence when the instructions are argued and acted upon by the court. The defendant must be present when an objection to a question propounded by counsel for the State is argued. *State* v. *Snider*, 81 W. Va. 522, 94 S. E. 981. The presence of the defendant is required during an argument on a motion to strike evidence. *State* v. *Sutter*, 71 W. Va. 371, 76 S. E. 811, 43 L.R.A., N.S., 399. It is reversible error to hear arguments in favor of and against a motion for a new trial when the accused is not personally present. *State* v. *Grove*, 74 W. Va. 702, 82 S. E. 1019. See also 53 Am. Jur., Trial, Sections 24 and 995, and 23 C.J.S., Criminal Law, Section 975, wherein *State* v. *McCausland*, 82 W. Va. 525, 96 S. E. 938, is cited.

The petitioner contends that even though he was absent during a part of the trial, nothing transpired at that time which affected him, and that there was no necessity for declaring a mistrial. In view of the statute and authorities cited and quoted above, this contention is without merit. An examination of the transcript of the trial which is before us in this proceeding shows that during such absence counsel for the petitioner withdrew all of his prior motions for a mistrial; stated to the court that the petitioner was entitled to a directed verdict and argued that point at some length, including the citation and discussion of cases; presented argument in resistance to the granting of a mistrial; and made

several statements in support of his contention that the petitioner's constitutional rights were being violated.

We think that the action which took place in the judge's chambers, in the absence of the accused, definitely affected his rights. This presents a stronger case than those cited above and clearly reveals that a substantive part of the trial was conducted in the absence of the petitioner. The question then presented is whether such absence gives rise to a manifest necessity for discharging the jury.

A trial court, acting under Code, 62-3-7, may, for manifest necessity, discharge the jury and order a new trial. Such action will not afford a basis for a plea of former jeopardy. *State* v. *Shelton*, 116 W. Va. 75, 178 S. E. 633; *Mack* v. *Commonwealth*, 177 Va. 921, 15 S. E. 2d 62; 22 C.J.S., Criminal Law, Section 258. The specific question presented here is whether the court, in discharging the jury because of the absence of the petitioner, abused its discretion. In view of the provisions of Code, 1931, 62-3-2, and the cases herein cited, we are of the opinion that the court properly exercised its discretion in discharging the jury when it became aware of the absence of the petitioner during a material part of the trial. All presumptions exist in favor of the regularity of the judgments of trial courts and one who asserts the contrary is required to overcome the presumption by record proof. *Mack* v. *Commonwealth*, 177 Va. 921, 15 S. E. 2d 62. See also *State ex rel. Ashworth* v. *Boles*, ... W. Va. ..., 132 S. E. 2d 634, and cases cited therein. In the instant case, relative to the issue under consideration, the petitioner did not overcome that presumption. We are therefore of the opinion that the court did not abuse its discretion in finding that there was a manifest necessity for declaring a mistrial.

The petitioner here contends that since the court recited to the jury only one reason for declaring a mistrial, it was barred from including a further reason therefor in its order. This contention must fail. The correctness of its final action is the only material consideration, not the stated reasons for taking such action. Quoting the third point of the syllabus of the case of *Shrewsbury* v. *Miller*, 10 W. Va. 115, this court, in *Rollins* v. *Daraban*, 145 W. Va. 178, 113 S. E. 2d 369, said: "It makes no difference upon what ground the court below decided the case,

or the particular matter complained of, it is not the reasons assigned upon which the court decided a question that is to be reviewed, but the action of the court itself; and the question always in the appellate court is, whether the judgment to be reviewed is correct."

In *Dunn's Ex'rs.* v. *Renick*, 40 W. Va. 349, 22 S.E. 66, it was said: "* * * the action of a court may be stated to be on an insufficient reason, and yet be right for a different reason. The reason given is immaterial, and the question in the appellate court is, is the decision for any reason, correct?" See also *Henry* v. *Ohio River Railroad Co.*, 40 W. Va. 234, 21 S. E. 863. Since we find that the trial court did not abuse its discretion in declaring a mistrial on the ground of the absence of the petitioner during a part of the trial, we hold immaterial the fact that such reason was not stated to the jury.

Subsidiary issues were raised herein, but since we believe that they are not pertinent to the decision of this case they are not discussed.

For the reasons stated and discussed herein the writ prayed for is denied.

Writ denied.

APPENDIX XII

ORDER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA DISCHARGING THE RULE AND DENYING WRIT OF PROHIBITION

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 25th day of February, 1964, the following order was made and entered, to-wit:

State of West Virginia ex rel. William Dandy, Relator
12285 vs. Prohibition

William Thompson, Judge of The Intermediate Court of Kanawha County, and Charles Walker, Prosecuting Attorney of Kanawha County, West Virginia, Respondents

The Court, having maturely considered the petition, and exhibits, the rule awarded thereon, the respondents' answer to the rule heretofore issued herein, the transcript of the record in the Intermediate Court of Kanawha County, the depositions filed herein, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that the relator is not entitled to the writ of prohibition prayed for in his said petition. It is therefore considered and ordered by the Court that the writ of prohibition prayed for in this proceeding be, and the same is hereby denied and the rule heretofore awarded is discharged, and that the respondents do recover of and from the relator their costs in this Court in this behalf expended.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Judge Caplan, was concurred in by Judges Haymond, Browning, Calhoun and Berry.

A True Copy

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX XIII

PETITION OF SUSPENSION OF EXECUTION OF ORDER

NO. 12285

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston

STATE OF WEST VIRGINIA,
ex rel. WILLIAM DANDY,
Petitioner

VS.

WILLIAM THOMPSON, Judge of the Intermediate Court of Kanawha County and CHARLES WALKER, Prosecuting Attorney of Kanawha County, West Virginia.

Respondents.

PETITION FOR SUSPENSION OF EXECUTION OF ORDER

* * *

TO THE HONORABLE THE JUDGES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioner, William Dandy, says and represents unto this Honorable Court:

1. That he is a party to a controversy in the Supreme Court of Appeals and desires to present a petition to the Supreme Court of the United States for an appeal or writ of certiorari from a mandate of this Court entered in the within styled case on the 25th day of February, 1964, and he here requests that he be granted a suspension of execution of said judgment for a period of ninety (90) days as provided in Code 58-5-31.

2. That he is presently at liberty on bond in the penal sum of $1000.00 and does further request that said bond be con-

tinued as sufficient in accordance with this said petition and Chapter 58, Article 5, Section 31 of the Code.

By Counsel

PREISER, WEAVER & DAUGHTERY
By

Stanley E. Preiser

W. Dale Greene
Third Floor, Union Bldg.
Charleston, West Virginia
Of Counsel

VERIFICATION

WILLIAM DANDY, the petitioner named in the foregoing petition, being by me first duly sworn according to law, upon his oath says that the facts and allegations therein contained are true, except insofar as they are therein stated to be upon information, and that insofar as they are therein stated to be upon information, they believes them to be true

WILLIAM DANDY

Taken, subscribed and sworn to before me this the 5th day of March, 1964.

My commission expires: February 1, 1973.

EUNICE L. DAVIS
Notary Public

APPENDIX XIV

ORDER OF SUPREME COURT OF APPEALS OF WEST VIRGINIA SUSPENDING PROCEEDINGS

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 9th day of March, 1964, the following order was made and entered, to-wit:

State of West Virginia ex rel. William Dandy, Relator
12285 vs. Prohibition
William Thompson, Judge of The Intermediate Court of Kanawha County, and Charles Walker, Prosecuting Attorney of Kanawha County, West Virginia, Respondents

On a former day, to-wit, March 5, 1964, came the relator, William Dandy, by Preiser, Weaver & Daughtery and Stanley E. Preiser and W. Dale Greene, his attorneys, and presented to the Court his motion in writing to suspend the execution of the judgment entered February 25, 1964 and the mandate of this Court, pending an application to the Supreme Court of the United States for an appeal from the final judgment of this Court of February 25, 1964, denying relator a writ of prohibition and discharging the rule heretofore awarded, pursuant to the provisions of the Code, Chapter 58, Article 5, Section 31.

Upon consideration whereof, the Court is of opinion to grant the motion. It is therefore considered and ordered that the execution of the judgment entered February 25, 1964 and the mandate of this Court be suspended for a period of ninety days from February 25, 1964, in order to permit the aforesaid relator to apply to the Supreme Court of the United States for an appeal or writ of certiorari herein.

And it appearing from said petition that relator has already entered into and given bond for his appearance in the Intermediate Court of Kanawha County for re-trial upon the indictment involved in this proceeding, it is considered and ordered that no further or additional bond is required to be given.

A True Copy

Attest: Kenneth E. Hines
Clerk Supreme Court of Appeals